TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 1044.

L. ZECKENDORF AND ALBERT STEINFELD, PARTNERS UNDER THE FIRM-NAME OF L. ZECKENDORF & CO., APPELLANTS,

vs.

JOHN S. JOHNSON.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

FILED SEPTEMBER 15, 1887.

accession 21839

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1-4 *Transcript on Appeal.*

In the Supreme Court of the Territory of Arizona.

JOHN S. JOHNSON, Plaintiff and Respondent,

vs.

P. R. TULLY, ESTEVAN OCHOA, and SYDNEY R. DE LONG, Copartners Doing Business under the Firm Name and Style of Tully, Ochoa & Co., and L. Zeckendorf & Albert Steinfeld, Copartners Doing Business under the Firm Name and Style of L. Zeckendorf & Co., Defendants and Appellants. } No. —.

Earll, Campbell & Stephens, attorneys for defendants and appellants; H. R. Jeffords and R. D. Ferguson, attorneys for plaintiff and respondent.

(Endorsed:) Filed July 8th, 1886. E. B. Dodge, clerk, by Ed. H. Cook, deputy.

5 *Complaint.*

In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Pima.

JOHN S. JOHNSON, Plaintiff,

vs.

P. R. TULLY, ESTEVAN OCHOA, and SYDNEY R. DE LONG, Copartners Doing Business under the Firm Name and Style of Tully, Ochoa & Co., and L. Zeckendorf & Albert Steinfeld, Copartners Doing Business under the Firm Name and Style of L. Zeckendorf & Co., Defendants.

For cause of complaint plaintiff alleges—

I.

6 That on the 17th day of September, A. D. 1881, at Tucson, said Pima county, the defendants, Tully, Ochoa & Co., who at that time were partners in said Tucson doing and carrying on business under said firm name of Tully, Ochoa & Co., made their promissory note in words and figures as follows, to wit:

"$2,800.00. TUCSON, A. T., *Sept.* 17, 1881.

"Three months after date we promise to pay to the order of L. Zeckendorf & Co. twenty-eight hundred dollars, at two per cent. interest per month, value received.

"TULLY, OCHOA & CO."

II.

That on said 17th day of September, A. D. 1881, the defendants, L. Zeckendorf & Co., who were at that time and now are copartners doing and carrying on business at said Tucson under the firm name and style of L. Zeckendorf & Co., duly endorsed said note as follows, to wit, "L. Zeckendorf & Co.," when said Tully, Ochoa & Co. delivered the same to this plaintiff, and then and there procured from him the said sum of $2,800.00, lawful money of the United States, for the mutual accommodation of both of the said firms.

III.

That afterwards, to wit, on the 17th day of December, 1881, at said Tucson, the said defendants, L. Zeckendorf & Co., waived
7 notice of demand and non-payment of the same by endorsement on said note in words and figures as follows, to wit:

"We hereby waive protest.
"Tucson, A. T., December 17, 1881.
"L. ZECKENDORF & CO.
"J. WITTLEOBF."

And at the said last named date and place said defendants, Tully, Ochoa & Co., waived notice of demand and non-payment of said note by endorsement thereon in words as follows, to wit:

"We hereby waive protest on the within.
"TULLY, OCHOA & CO."

That said note was made by the defendants, Tully, Ochoa & Co., and endorsed by the defendants, L. Zeckendorf & Co., for the purpose of securing a loan of two thousand eight hundred dollars, lawful money of the United States, from the plaintiff on the faith of said endorsement; that the defendants, L. Zeckendorf & Co., indorsed the same for the purpose of procuring for said defendants, Tully, Ochoa & Co., from the plaintiff this said sum of $2,800.00, knowing that the same would be so procured, and that said note was so passed and so indorsed by said defendants, L. Zeckendorf & Co., with their privity, to this plaintiff and said sum of $2,800.00 obtained from plaintiff on the faith of said indorsement.

8 V.

That plaintiff is the owner and holder of said note.

VI.

That no part of either the principal sum mentioned in said note or interest thereon has been paid, except as follows, to wit: Paid December 17, 1881, $168.00; March 25, 1882, $168.00; December 21, 1882, $350.00; February 23, 1883, $154.00; March 27, 1883,

$168.00, and November 7, 1883, $190.00 (making total interest so paid the sum of $1,198.00), which said several payments are duly endorsed on said note at and on the several dates as above set forth, and the whole of said note and interest thereon, as by the terms therein expressed, less the said several payments, remains due, owing, and unpaid.

Wherefore plaintiff demands judgment against said defendants for the sum of $3,453.75, with two per cent. per month interest on the sum of $2,800 from the 19th day of May, A. D. 1884, and for the costs of this action and for such other and further relief as to this court may seem just and proper.

FERGUSON & WALSH,
Attorneys for Plaintiff.

TERRITORY OF ARIZONA,
County of Pima,

9 John S. Johnson, being duly sworn, deposes and says that he is the plaintiff in the above-entitled action; that he has heard read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

JOHN S. JOHNSON.

Subscribed and sworn to before me this 19th day of May, A. D. 1884.

[SEAL.] M. J. WALSH,
Notary Public.

Endorsed: Filed May 20, 1884. C. S. Jeffords, clerk, by J. A. Anderson, deputy clerk.

Demurrer of Defendants, L. Zeckendorf & Co.

(Title of court and cause.)

Now come L. Zeckendorf and Albert Steinfeld, two of the defendants in the above-entitled action, and demur to the plaintiff's complaint for the ground that it appears upon the face of the complaint that the complaint does not state facts sufficient to constitute a cause of action against them or either of them.

EARLL, CAMPBELL & STEPHENS,
Attorneys for said Defendants.

10 Endorsed: Filed May 23d, 1884. C. S. Jeffords, clerk, by J. A. Anderson, Jr., deputy.

Amended Complaint by Stipulation in Open Court.

(Title of court and cause.)

For cause of complaint plaintiff alleges—

I.

That on the 17th day of September, A. D. 1881, at Tucson, said Pima county, the defendants, P. R. Tully, Estevan Ochoa, and Sydney R. De Long, who at that time were partners in said Tucson doing and carrying on business under said firm name and style of Tully, Ochoa & Co., made their promissory note in words and figures as follows, to wit:

"$2,800. TUCSON, A. T., *Sept. 17th*, 1881.

"Three months after date we promise to pay to the order of L. Zeckendorf & Co. twenty-eight hundred dollars, at two per cent. interest per month, value received.

"TULLY, OCHOA & CO."

II.

11 That on said 17th day of September, 1881, the defendants, L. Zeckendorf and Albert Steinfeld, who were at that time and now are copartners doing and carrying on business at said Tucson under the firm name and style of L. Zeckendorf & Co., duly endorsed said note in words and figures as follows, to wit, L. Zeckendorf & Co.; at which time and on the 17th day of September, 1881, they, the said L. Z. & Co., and the said Tully, Ochoa & Co., delivered the same to plaintiff, and then and there procured from him the said sum of twenty-eight hundred (2,800) dollars, lawful money of the United States, for the mutual accommodation of both of the said firms.

III.

That afterwards, to wit, on the 17th day of September, 1881, at said Tucson, the said defendants, L. Zeckendorf & Co., waived notice of demand and non-payment of the same by endorsement on said note in words and figures as follows, to wit:

"We hereby waive protest.
"Tucson, A. T., Dec. 17, 1881.

"L. ZECKENDORF & CO.
"J. WITTLEOBF."

12 And at the last named date and place said defendants, Tully, Ochoa & Co., waived notice of demand and non-payment of said note by endorsement thereon in words, to wit:

"We hereby waive protest on the within.

"TULLY, OCHOA & CO."

IV.

That said note was made by the defendants, Tully, Ochoa & Co., and endorsed by the defendants, L. Zeckendorf & Co., for the purpose of securing a loan of two thousand eight hundred ($2,800) dollars, lawful money of the United States, from this plaintiff on the faith of said endorsement; that the defendants, L. Zeckendorf & Co., indorsed the same for the purpose of procuring for said defendants, Tully, Ochoa & Co., from this plaintiff the said sum of two thousand eight hundred ($2,800.00) dollars, knowing that the same would be so procured, and that said note was so passed and so endorsed by said defendants, L. Zeckendorf & Co., with their privity, to this plaintiff and said sum of two thousand eight hundred ($2,800.00) dollars obtained from plaintiff on the faith of said endorsement.

V.

That plaintiff is the owner and holder of said note.

VI.

13 That no part either of the principal sum mentioned in said note or interest thereon has been paid, except as follows, to wit: Paid Dec. 17, 1881, $168.00; March 25th, 1882, $168.00; Dec. 21st, 1882, $350.00; February 23d, 1883, $154.00; March 27th, 1883, $168.00, and Nov. 7th, 1883, $190.00 (making total interest so paid the sum of $1,198.00), which said several payments are duly endorsed on said note at and on the several dates as above set forth, and the whole of said note and the interest thereon, as by the terms therein expressed, less the said several payments, remains due, owing, and unpaid. Wherefore plaintiff demands judgment against said defendants for the sum of three thousand three hundred and ninety-seven and $\frac{75}{100}$ dollars ($3,397.75), with two per cent. interest per month on the sum of two thousand eight hundred ($2,800.00) dollars from the 19th day of May, A. D. 1884, and for the costs of this action and for such other and further relief as to this court may seem just and proper.

R. D. FERGUSON AND
H. R. JEFFORDS,
Attorneys for Plaintiff.

TERRITORY OF ARIZONA, } ss:
County of Pima, }

R. D. Ferguson, being duly sworn, deposes and says that he is one of the plaintiff's attorneys in the above-entitled action; that
14 he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are stated therein on information or belief, and as to those matters he believes them to be true; that he has been informed of the facts therein contained by his client, the said John S. Johnson, and by other parties familiar with said facts, of

whom is said defendant, A. Steinfeld, and said P. R. Tully, and that he makes this affidavit on behalf of plaintiff because he is temporarily absent from the Territory and cannot be communicated with in time to subserve the necessities of making said affidavit.

R. D. FERGUSON.

Subscribed and sworn to before me this 24th day of November, 1884.

C. S. JEFFORDS, *Clerk.*

It is stipulated by defendant, L. Zeckendorf & Co., that the within complaint be considered as verified and defendants' (L. Z. & Co.) appearance be considered as entered therein; that this complaint as amended herein stand for and as a substitute for the original complaint in this action, as far as the said defendants, L. Zeckendorf and A. Steinfeld, are concerned, with their leave to answer in 10 days from this date, Nov. 24th, 1884.

Received a copy of the amended complaint this 24th day
15 of November, 1884, and defendants, L. Zeckendorf & Co., waive any other or further service herein and stipulate to plead the same in five days.

EARLL, CAMPBELL & STEPHENS,
Att'ys for L. Z. & Co.

Endorsed: Filed November 24th, 1884. C. S. Jeffords, clerk.

Answer of L. Zeckendorf & Co.

(Title of court and cause.)

Now come L. Zeckendorf and Albert Steinfeld, composing the said firm of L. Zeckendorf & Co., and for themselves, answering the plaintiff's complaint herein—

First.

Deny that these defendants, as L. Zeckendorf & Co. or otherwise, on the said 17th day of September, 1881, or at any other time, duly or otherwise endorsed the said note mentioned and set forth in paragraph I of said complaint or ever authorized any person to endorse the same.

Second.

These defendants deny that L. Zeckendorf & Co. or either member of said firm, on the 17th day of December, A. D. 1882, or
16 at any other time, at said Tucson or at any other place, ever waived notice of demand or non-payment of said note by endorsement on said note or otherwise or at all, and they deny that said L. Zeckendorf & Co. or either member of said firm ever signed or executed the waiver of protest mentioned and set forth in paragraph III of said complaint or ever authorized the said J. Wittelobf or any other person to sign or execute the same.

Third.

And these defendants deny that they, L. Zeckendorf & Co., or either member of said firm, or any other person authorized by said firm, endorsed said note for the purpose of securing a loan of two thousand eight hundred dollars or any other sum from the plaintiff or any other person, and they deny that said L. Zeckendorf & Co. or either member of said firm, or any person authorized by said firm or either member thereof, ever endorsed said note at all.

Wherefore these defendants, L. Zeckendorf & Co., demand judgment against said plaintiff that the complaint herein be dismissed and for costs of suit, including the percentage allowed by law.

EARLL, CAMPBELL & STEPHENS,
Attorneys for L. Zeckendorf & Co.

17 TERRITORY OF ARIZONA, } ss:
County of Pima, }

Albert Steinfeld, being first duly sworn, deposes and says that he is one of the above-named defendants; that he has heard read the above and foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

ALBERT STEINFELD.

Subscribed and sworn to before me this 29th day of November, 1884.

LOUIS A. SOUC,
Notary Public, Pima County, A. T.

Endorsed: Filed Nov. 29, 1884. C. S. Jeffords, clerk.

We hereby admit service of a copy of the within answer upon us this 29th day of November, '83.

——— ———,
Plaintiff's Attorneys.

Second Amended Complaint.

(Title of court and cause.)

Plaintiff herein, with leave of court, submits this his amended complaint, and for cause thereof alleges—

18 First.

That on the 17th day of September, A. D. 1881, at Tucson, said Pima county, the defendants, P. R. Tully, Estevan Ochoa, and Sydney R. De Long, who at that time were partners in said Tucson, doing and carrying on business under said firm name and style of Tully, Ochoa & Co., made their promissory note in words and figures as follows, to wit:

"2,800.00. TUCSON, A. T., *Sept. 17th*, 1881.

"Three months after date we promise to pay to the order of L. Zeckendorf & Co. twenty-eight hundred dollars at two per cent. interest, value received.

"TULLY, OCHOA & CO."

Second.

That on the said 17th day of September, 1881, the defendants, L. Zeckendorf and Albert Steinfeld, who were at that time and now are copartners, doing and carrying on business at said Tucson under the firm name and style of L. Zeckendorf & Co., duly endorsed said note in words and figures as follows, to wit: "L. Zeckendorf & Co.," at which time and on said 17th day of September, 1881, they, the said L. Zeckendorf & Co. and the said Tully, Ochoa & Co.,
19 delivered the same to plaintiff, and then and there procured from him the said sum of twenty-eight hundred ($2,800.00) dollars, lawful money of the United States, for the mutual accommodation of both of the said firms.

Third.

That afterwards, to wit, on the 17th day of December, 1881, at said Tucson, the said defendants, L. Zeckendorf & Co., waived notice of demand and non-payment of the same by endorsement on said note in words and figures as follows, to wit:

"We hereby waive protest.
"Tucson, A. T., Dec. 17, 1881.

"L. ZECKENDORF & CO.
"J. WITTLEOBF."

And at the last-named date and place said defendants, Tully, Ochoa & Co., waived notice of demand and non-payment of said note by endorsement thereon in words, to wit:

"We hereby waive protest on the within.

"TULLY, OCHOA & CO."

Fourth.

That said note was made by the defendants, Tully, Ochoa & Co., for the use and benefit of said defendants, L. Zeckendorf & Co., and was endorsed by said defendants, L. Zeckendorf & Co., for the purpose of securing a loan of $2,800.00, lawful money of the United States, from this plaintiff, on the faith of said endorsement.
20 That defendants, L. Zeckendorf & Co., endorsed the same for the purpose of procuring from this plaintiff for said L. Zeckendorf & Co. the sum of $2,800.00, knowing that the same would be so procured, and that the said note was so passed and endorsed by said L. Zeckendorf & Co., with their privity to this plaintiff, and said sum of $2,800.00 obtained from plaintiff solely on the faith of said endorsement and paid over to the said firm of L. Zeckendorf & Co. for their use and benefit.

Fifth.

That the plaintiff is the owner and holder of said note.

Sixth.

That no part, either of the principal sum mentioned in said note or interest thereon, has been paid, except as follows, to wit: Paid, Dec. 17th, 1881, $168.00; March 25th, 1882, $168.00; December 21st, 1882, $350.00; February 23d, 1883, $154.00; March 27th, 1883, $168.00, and Nov. 7th, 1883, $190.00 (making total interest so paid the sum of $1,198.00); which said several payments are duly endorsed on said note, at and on the several dates as above set forth, and the whole of said note and interest thereon, as by the terms therein expressed, less the said several payments, remains due, owing, and unpaid.

21 Wherefore plaintiff demands judgment against said defendants for the sum of three thousand three hundred and ninety-seven and $\frac{75}{100}$ ($3,397.75) dollars, with two per cent. interest per month on the sum of two thousand eight hundred ($2,800.00) dollars from the 19th day of May, A. D. 1884, and for the costs of this action, with legal damages, and for such other and further relief as to this court may seem just and proper.

R. D. FERGUSON AND
H. R. JEFFORDS,
Plaintiff's Attorneys.

TERRITORY OF ARIZONA, } ss:
County of Pima, }

R. D. Ferguson, being duly sworn, deposes and says that he is one of the plaintiff's attorneys in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are stated therein on information or belief, and as to those matters he believes them to be true; that he has been informed of the facts therein contained by his client, the said John S. Johnson, and by other parties familiar with said facts, of whom is said defendant, A. Steinfeld, and said P. R. Tully; and that he makes this affidavit on behalf of plaintiff because he is temporarily

22 absent from this Territory and cannot be communicated with in time to subserve the necessities of making said affidavit.

R. D. FERGUSON.

Subscribed and sworn to before me this 19th day of March, 1884.

[SEAL.] J. A. ANDERSON, JR.,
Deputy Clerk.

We acknowledge receipt of a copy of within notice this 19th day of March, 1885.

EARLL, CAMPBELL & STEPHENS,
Defendant's Attorneys.

(Endorsed:) Filed March 19th, 1885. C. S. Jeffords, clerk, by J. A. Anderson, Jr., deputy.

Answer.

(Title of court and cause.)

Now come L. Zeckendorf and Albert Steinfeld, two of the defendants above named, and, answering the plaintiff's amended complaint herein—

I. Deny that they *are* or either of them, on the 17th day of September, 1881, or at any time, under their firm name or style of L. Zeckendorf & Co., or otherwise, endorsed said note, and they deny that said note was so endorsed by any person who had right or authority from these defendants to endorse the same.

23 II. Deny that on the said 17th day of September, 1881, or at any time, the said L. Zeckendorf & Co., or either member of said firm, or any person having authority from them, delivered said note to the plaintiff, and they deny that they or either of them, as copartners or otherwise, procured the said twenty-eight hundred dollars from the plaintiff, and they deny that the same or any part thereof was procured for the mutual accommodation of said firm of L. Zeckendorf & Co. and the said Tully, Ocho & Co., but the same and the whole thereof was procured from the plaintiff by the firm of Tully, Ochoa & Co., and for the sole use and accommodation of said last-named firm.

III. These defendants deny that afterwards, to wit, on the 17th day of December, 1881, or at any other time, these defendants, L. Zeckendorf & Co., or either member of said firm, or any person authorized by said firm or either member thereof, waived notice of demand or of non-payment; and they deny that the words, "We hereby waive protest. Tucson, A. T., Dec. 17th, 1881. L. Zeckendorf & Co., J. Wittelobf," or any of the said words or figures in said alleged endorsement, were made by the said L. Zeckendorf & Co., or by either member of said firm, or any person authorized to make such an endorsement for or on behalf of said firm.

24 IV. These defendants deny that the said note was made by the defendants, Tully, Ochoa & Co., for the use and benefit of said defendants, L. Zeckendorf & Co., but, on the contrary, these defendants allege that the said Tully, Ochoa & Co. made the said note for their own use and benefit and for the purpose of procuring the said twenty-eight hundred dollars loan for themselves, and the same was procured by them, and no part thereof was procured by the said firm of L. Zeckendorf & Co. from the plaintiff, or for their use or benefit, and these defendants deny that the defendants, L. Zeckendorf & Co., endorsed the said note for the purpose of procuring from the plaintiff the said sum of $2,800, or any part thereof, for said L. Zeckendorf & Co., but, on the contrary, these defendants allege that neither member of said firm ever endorsed said note, and if said note was endorsed by any agent or employé of said firm that it was so endorsed for the accommodation, use, and benefit of the

said firm of Tully, Ochoa & Co., and not for the purpose of procuring the said money for L. Zeckendorf & Co.; and these defendants further allege that neither member of said firm had any knowledge of the making of said note or the endorsement thereof or for the procuring of said money from the plaintiff until nearly three years after the date of said note.

Wherefore these defendants demand judgment against the said plaintiff that the said complaint be dismissed as to them, and
25 for their costs of said suit, including the percentage allowed by law.

EARLL, CAMPBELL & STEPHENS,
Attorneys for said Defendants.

TERRITORY OF ARIZONA, } ss:
County of Pima, }

Albert Steinfeld, being duly sworn, says that he is one of the defendants answering herein; that he has read the above and foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are herein stated on information or belief, and as to those matters he believes it to be true.

ALBERT STEINFELD.

Subscribed and sworn to before me this the 30th day of March, A. D. 1885.

[SEAL.]

M. GERVAIS,
Notary Public, Pima Co., A. T.

Endorsed: Filed March 31, 1885. C. S. Jeffords, clerk, by J. A. Anderson, Jr., deputy.

I hereby acknowledge receipt of answer, of which the within is a copy, this the 31st day of March, A. D. 1885.

R. D. FERGUSON,
Attorney for Plaintiff.

26 *Findings of Fact and Decision.*

(Title of court and cause.)

Be it remembered that this cause came on regularly for trial on the 31st day of March, 1885, before the court without a jury, a jury trial having been duly waived by both parties hereto, on the second amended complaint of plaintiff and the answer of the defendants, L. Zeckendorf & Co., thereto, and Messrs. R. D. Ferguson and H. R. Jeffords appearing as attorneys for plaintiff and Messrs. Earll, Campbell & Stephens appearing as attorneys for the defendants, L. Zeckendorf & Co.; and from the evidence introduced the court finds the following facts:

(Endorsed:) Filed March 19th, 1885. C. S. Jeffords, clerk, by J. A. Anderson, Jr., deputy.

Answer.

(Title of court and cause.)

Now come L. Zeckendorf and Albert Steinfeld, two of the defendants above named, and, answering the plaintiff's amended complaint herein—

I. Deny that they *are* or either of them, on the 17th day of September, 1881, or at any time, under their firm name or style of L. Zeckendorf & Co., or otherwise, endorsed said note, and they deny that said note was so endorsed by any person who had right or authority from these defendants to endorse the same.

23 II. Deny that on the said 17th day of September, 1881, or at any time, the said L. Zeckendorf & Co., or either member of said firm, or any person having authority from them, delivered said note to the plaintiff, and they deny that they or either of them, as copartners or otherwise, procured the said twenty-eight hundred dollars from the plaintiff, and they deny that the same or any part thereof was procured for the mutual accommodation of said firm of L. Zeckendorf & Co. and the said Tully, Ocho & Co., but the same and the whole thereof was procured from the plaintiff by the firm of Tully, Ochoa & Co., and for the sole use and accommodation of said last-named firm.

III. These defendants deny that afterwards, to wit, on the 17th day of December, 1881, or at any other time, these defendants, L. Zeckendorf & Co., or either member of said firm, or any person authorized by said firm or either member thereof, waived notice of demand or of non-payment; and they deny that the words, "We hereby waive protest. Tucson, A. T., Dec. 17th, 1881. L. Zeckendorf & Co., J. Wittelobf," or any of the said words or figures in said alleged endorsement, were made by the said L. Zeckendorf & Co., or by either member of said firm, or any person authorized to make such an endorsement for or on behalf of said firm.

24 IV. These defendants deny that the said note was made by the defendants, Tully, Ochoa & Co., for the use and benefit of said defendants, L. Zeckendorf & Co., but, on the contrary, these defendants allege that the said Tully, Ochoa & Co. made the said note for their own use and benefit and for the purpose of procuring the said twenty-eight hundred dollars loan for themselves, and the same was procured by them, and no part thereof was procured by the said firm of L. Zeckendorf & Co. from the plaintiff, or for their use or benefit, and these defendants deny that the defendants, L. Zeckendorf & Co., endorsed the said note for the purpose of procuring from the plaintiff the said sum of $2,800, or any part thereof, for said L. Zeckendorf & Co., but, on the contrary, these defendants allege that neither member of said firm ever endorsed said note, and if said note was endorsed by any agent or employé of said firm that it was so endorsed for the accommodation, use, and benefit of the

said firm of Tully, Ochoa & Co., and not for the purpose of procuring the said money for L. Zeckendorf & Co.; and these defendants further allege that neither member of said firm had any knowledge of the making of said note or the endorsement thereof or for the procuring of said money from the plaintiff until nearly three years after the date of said note.

Wherefore these defendants demand judgment against the said plaintiff that the said complaint be dismissed as to them, and
25 for their costs of said suit, including the percentage allowed by law.

EARLL, CAMPBELL & STEPHENS,
Attorneys for said Defendants.

TERRITORY OF ARIZONA, } ss:
County of Pima, }

Albert Steinfeld, being duly sworn, says that he is one of the defendants answering herein; that he has read the above and foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are herein stated on information or belief, and as to those matters he believes it to be true.

ALBERT STEINFELD.

Subscribed and sworn to before me this the 30th day of March, A. D. 1885.

[SEAL.]

M. GERVAIS,
Notary Public, Pima Co., A. T.

Endorsed: Filed March 31, 1885. C. S. Jeffords, clerk, by J. A. Anderson, Jr., deputy.

I hereby acknowledge receipt of answer, of which the within is a copy, this the 31st day of March, A. D. 1885.

R. D. FERGUSON,
Attorney for Plaintiff.

26 *Findings of Fact and Decision.*

(Title of court and cause.)

Be it remembered that this cause came on regularly for trial on the 31st day of March, 1885, before the court without a jury, a jury trial having been duly waived by both parties hereto, on the second amended complaint of plaintiff and the answer of the defendants, L. Zeckendorf & Co., thereto, and Messrs. R. D. Ferguson and H. R. Jeffords appearing as attorneys for plaintiff and Messrs. Earll, Campbell & Stephens appearing as attorneys for the defendants, L. Zeckendorf & Co.; and from the evidence introduced the court finds the following facts:

I.

That on the 17th day of September, 1881, the defendants, Tully Ochoa & Co., executed the promissory note set forth in the complaint herein.

II.

That on the 17th day of September, 1881, Charles M. Straus endorsed the promissory note set forth in the complaint herein in the name of the said defendants, L. Zeckendorf & Co., and for them.

III.

27 The said Charles M. Straus was the cashier of defendants, L. Zeckendorf & Co., and was fully authorized to endorse said promissory note for them and in their name.

IV.

That said defendants, Tully, Ochoa & Co. and L. Zeckendorf & Co., caused said promissory note to be delivered to said plaintiff in consideration of the loan of the sum of two thousand eight hundred ($2,800) dollars lawful money.

V.

That said promissory note was made by the defendants, Tully, Ochoa & Co., payable to L. Zeckendorf & Co., and endorsed by the defendants, L. Zeckendorf & Co., before the delivery thereof to plaintiff, for the preconcerted and express purpose of borrowing from the plaintiff the said two thousand eight hundred dollars on said promissory note.

VI.

That it was intended and agreed between all the defendants, at the time said promissory note was made, endorsed, and delivered to plaintiff, that all the money thereon should go to the defendants, L. Zeckendorf & Co., and be applied to their use, and it was not intended that said promissory note should be held or carried by the defendants, L. Zeckendorf & Co., until the maturity thereof.

28 VII.

That the said sum of twenty-eight hundred dollars, so borrowed from plaintiff on said promissory note, was received by the defendants, L. Zeckendorf & Co., on the said 17th day of September, 1881.

VIII.

That said sum of two thousand eight hundred dollars was loaned by plaintiff on the faith of the endorsement of said L. Zeckendorf & Co., defendants.

IX.

That the plaintiff caused the said promissory note to be presented at the office of the defendants, L. Zeckendorf & Co., on the 17th day of December, 1881, for the purpose of having said defendants, L. Zeckendorf & Co., waive notice of demand for payment and notice of non-payment thereof; that both Albert Steinfeld and Louis Zeckendorf were absent from Tucson, as was also Charles M. Strauss, cashier of said defendants, L. Zeckendorfer & Co.; and thereupon J. Whittleshoeffer, who was then and there the general agent of said defendants, L. Zeckendorf & Co., and who was then and there in charge of their business in Tucson, Arizona, acting for the said defendants, L. Zeckendorf & Co., waived notice of demand for
29 payment and notice of the non-payment of the said promissory note in the words and figures following, to wit: We hereby waive protest. Tucson, A. T., December 17, 1881. L. Zeckendorf & Co., J. Wittlobf. That said J. Wittleshœffer was then and there fully authorized to make said waiver for said L. Zeckendorf & Co., defendants.

X.

That before the commencement of this action plaintiff caused said promissory note to be presented to Albert Steinfeld, the resident member of the firm of L. Zeckendorf & Co., defendants, at said city of Tucson, with demand that said defendants, L. Zeckendorf & Co., pay said promissory note according to the tenor and effect thereof; that at the time said promissory note was so presented and shown to said Albert Steinfeld and payment thereon demanded as aforesaid the books of the defendants, L. Zeckendorf & Co., showed that the proceeds of said promissory note had been received by the said defendants, L. Zeckendorf & Co., on the said 17th day of September, 1881, and, although said Steinfeld then and there saw that said promissory note was endorsed in the name of the defendants, L. Zeckendorf & Co., by Charles M. Strauss, he then and there refused on the part of said firm to pay said promissory note according to the
30 tenor and effect thereof, or to surrender the proceeds of the same, or any part of the said proceeds.

XI.

That no part of the principal sum of two thousand eight hundred dollars so loaned on said promissory note has been paid.

XII.

That $1,198.00, and no more, has been paid as interest upon said promissory note; that there is still due and unpaid on said promissory note the principal sum of twenty-eight hundred dollars and interest thereon in the sum of $1,504.93, aggregating the sum of $4,304.93 due and unpaid as principal and interest on said promissory note.

Conclusions of Law.

As conclusions of law from the foregoing facts the court finds that Tully, Ochoa & Co. and L. Zeckendorf & Co. were joint makers of said promissory note, and that L. Zeckendorf & Co. waived notice of demand for payment and notice of non-payment of said promissory note; that plaintiff is entitled to judgment against said defendants, L. Zeckendorf and Albert Steinfeld, partners under the firm name of L. Zeckendorf & Co., for the sum of $4,304.93
31 and the costs of suit and the percentage allowed by law and interest thereon from the date hereof upon said principal sum of $2,800.00 until paid, at the rate of two per cent. per month, and interest upon the balance at 10 per cent. per annum; and it is ordered that judgment be entered accordingly.

Dated this 26th day of September, 1885.

W. F. FITZGERALD,
District Judge.

I find as additional findings in the above-entitled case as follows:

I.

That at and before the time the promissory note described and set forth in the complaint in the above-entitled cause was made, executed, endorsed, and delivered the defendants, Tully, Ochoa & Co., were indebted to defendants, L. Zeckendorf & Co., in a sum largely exceeding the amount borrowed on said promissory note.

II.

That on the day the said sum of $2,800.00 was borrowed on said promissory note L. Zeckendorf & Co. gave credit to Tully, Ochoa & Co. on the books of L. Zeckendorf & Co. for the amount of $2,800.00, being the proceeds of said promissory note, and at the time the said sum of $2,800.00 was loaned on said promissory note the
32 plaintiff did not know the intention or purpose for which the said money was borrowed.

Dated this 26th day of September, 1885.

W. F. FITZGERALD,
Associate Justice.

Endorsed: Filed September 26, 1885. C. S. Jeffords, clerk.

Judgment.

(Title of court and cause.)

Be it remembered that this cause came on regularly for trial on the 31st day of March, 1885, on the second amended complaint of the plaintiff and the answer of the defendants, L. Zeckendorf and Albert Steinfeld, partners under the firm name of L. Zeckendorf &

Co., thereto, R. D. Ferguson, Esq., and H. R. Jeffords, Esq., appearing as counsel for plaintiff, and Messrs. Earll, Campbell & Stephens appearing as counsel for the defendants, L. Zeckendorf & Co. A trial by jury having been expressly waived by the counsel for the respective parties, the cause was tried before the court sitting without a jury. Whereupon A. Steinfeld, A. Cronly, J. S. Johnson, B. M. Jacobs, C. M. Strauss, C. T. Etchells, I. S. Fried, W. E. Felix, and J. Wittleshoefer were examined as witnesses for the plaintiff,
33 and A. Steinfeld, C. M. Straus, Ed. Hudson, Levi Prince, and W. A. Scott were examined as witnesses on the part of the defendants, L. Zeckendorf & Co.; and documentary testimony having been introduced by both parties, and the evidence being closed, the cause was submitted to the court for consideration and decision, and, after due deliberation thereon, the court delivers its findings and decision in writing, which is filed, and orders that judgment be entered in accordance therewith.

Wherefore, by reason of the law and the findings aforesaid, it is ordered and adjudged that J. S. Johnson, the plaintiff, do have and recover of and from L. Zeckendorf and Albert Steinfeld, partners under the firm name of L. Zeckendorf & Co., defendants, the sum of four thousand three hundred and four ($4,304.93) dollars and ninety-three cents, with interest on $2,800.00 of said sum at the rate of two per cent. per month from the date hereof until paid, and interest on $1,504.93 at the rate of ten per cent. per annum from the date hereof until paid, together with plaintiff's costs and disbursements incurred in the action, amounting to $115.05, and one hundred and sixteen ($116.09) dollars and nine cents percentage allowed by law.

Judgment rendered this 26th day of September, 1885.

W. F. FITZGERALD,
District Judge.

34 Endorsed: Filed September 28, 1885. C. S. Jeffords, clerk.

Findings and Decision.

(Title of court and cause.)

To Messrs. Earll, Campbell & Stephens, attorneys for L. Zeckendorf & Co., defendants.

GENTLEMEN: You will please take notice that the judge of said court has this day made and filed his findings and decision in the above-entitled action in favor of plaintiff, and that the judgment of said court has been rendered and entered in accordance therewith against the defendants, L. Zeckendorf and Albert Steinfeld, partners under the firm name of L. Zeckendorf & Co.

Yours respectfully,

R. D. FERGUSON AND
H. R. JEFFORDS,
Attorneys for Plaintiff.

We acknowledge receipt of a copy of the within notice and of the findings and decisions herein this 28th day of September, A. D. 1885.

EARLL, CAMPBELL & STEPHENS,
Att'ys of Defendants, L. Zeckendorf & Co.

Endorsed: Filed Sept. 28th, 1885. C. S. Jeffords, clerk.

35 *Statement on the Motion of Defendants, L. Zeckendorf and Albert Steinfeld, for a New Trial of the Cause.*

(Title of court and cause.)

This cause came on for trial by the court without a jury, a jury having been waived, on the 31st day of March, A. D. 1885, before Hon. W. F. Fitzgerald, judge of said court. The following evidence was then taken in the cause, which evidence, as taken down by the official reporter, and Exhibits "A" and "C," hereto attached, is as follows:

ALBERT STEINFELD, a witness called on behalf of the plaintiff and after being duly sworn, testified as follows:

Judge FERGUSON:

Q. Look at this paper and tell the court what you know about it, (showing paper).
A. That is a note.
Q. Did you ever see it before?
A. I saw it four or five months ago.
Q. When did you see it for the first time?
A. Mr. Etchells showed it to me.
Q. When?
A. I don't remember exactly when; four or five months ago.

36 Q. Will you turn that over and look at the back of it and notice those endorsements, and see if that will refresh your memory; can you refresh your recollection from that?
A. No, sir; not from the endorsement.
Q. Look at the lower one.
A. Yes, sir; I see it.
Q. I will ask you in connection with that if you know anything of the waiver of protest three months after date?
A. No, sir.
Q. Do you know anything about the money for which that note was given and what became of it, $28,000?
A. No, sir.
Q. I will ask you whether the amount of money obtained on that note on that date is on your books credited to any person?
A. My books will be here in a few minutes and they will show.
Q. Will you look at this paper and tell me what that is (showing paper to witness)?
A. That seems to be part of an account rendered.

Q. Is that a statement of account of L. Zeckendorf & Co. between them and Tully, Ochoa & Co.?

A. Partly so.

Q. Between what dates?

A. The whole account would show.

Q. Will that show by itself?

A. That shows nothing by itself.

37 Q. From where did that sheet emanate?

A. That is written on a bill of our house, L. Zeckendorf & Co.

Q. At whose instance was that written?

A. I could not say.

Q. In whose handwriting is that paper?

A. It is in the handwriting of the book-keeper who used to be in our employ.

Q. Who was it?

A. Mr. Lascar.

Q. Is it not a fact that this is a statement of account rendered by L. Zeckendorf & Co. to Tully, Ochoa & Co.?

A. That is a sheet, numbered three, partly representing some debits and credits.

Q. Are they not debits and credits of the house of Zeckendorf & Co. up to the time they appear to have been made?

A. I cannot tell without looking at the books.

Judge CAMPBELL: Let me look at that. (After examination:) This is nothing but a fragment.

The COURT: The books ought to show that.

WITNESS: You will notice that your debits commence two years later than your credits.

Judge FERGUSON: I will ask you to look at the date of this note.

A. Yes, sir; September 17th, 1881.

Q. Tell me what this credit dated September 17th, 1881, crediting Tully, Ochoa & Co. by note $2,800.00, means of the day and date of that note.

38 A. It is the same date and same amount, whether it is the same note I could not tell.

Q. Is there any other source from which your house received the sum of $2,800.00 on that date?

A. I cannot tell without the books; they will be here in a minute or two.

Q. At that time, on the 17th of September, did you have any knowledge of the payment of that amount of money into your business firm?

A. I did not; I never knew of it.

Q. Did you know anything of this statement of this account?

A. I don't think that I did.

Q. Did you never look over the accounts between yourself and Tully, Ochoa & Co.?

A. Yes, sir; I looked through our books generally.

Q. Is it not a part of your business as one of the house to look through the books and see that such entries are properly made?

A. No, sir; at that time I did not look over the correctness of the statements; I had a man in charge of that who attended to it.

Q. Will you state to the court what that credit is as you see it?

A. It speaks for itself.

Q. Who does it credit?

A. That is part of an account apparently rendered to Tully, Ochoa & Co., marked No. 3.

39 Q. And it credits them on the 17th of September, 1881, with $2,800.00 by note?

A. Yes, sir.

Q. Was any other note of that amount given to your firm at that time?

A. I could not say.

Judge CAMPBELL: If the gentlemen have an account to present they should present the whole of it.

The COURT: The books will show all that.

Judge FERGUSON: You speak of some person who was in charge of your business.

A. I did not say that.

Q. Who was in charge of the business and who was the general manager of the business of Zeckendorf & Co. at that time?

A. I was.

Q. Who else was in charge?

A. Mr. Strauss had charge of our office; he was our cashier.

Q. Do you remember in the month of March, 1882, meeting with me in your office?

A. No, sir.

Q. I will refresh your memory. Do you remember a contract made with Far for 670 cords of wood?

A. Yes; I remember something of that.

Q. Do you remember when I called on you for the first time?

A. I remember such a transaction happening.

40 Q. At that time do you remember my asking you in regard to the contract made with Far and your reply?

A. Yes, sir.

Q. Do you remember who was in your office at that time?

A. No, sir.

Q. Can you remember the reply that you made to me?

A. No, sir; I don't remember that; I remember the wood transaction with Far, but I don't remember any of the conversation had with you at that time.

Q. Don't you remember when I called on you? You were sitting somewhere in the inside room of the office, myself standing in the middle door and Mr. Strauss sitting between the table and the safe. Didn't you tell me at that time that you knew nothing or little of that contract, that Mr. Strauss had general charge of your business, and refer me to him?

A. No, sir; I made that contract with Mr. Far personally.

Q. Did you not at that time refer me to Mr. Strauss as the general manager of your house and tell me that he knew more of that contract than you did, and that I must consult him?

A. No, sir; I don't remember that.

Q. Have you any knowledge of a suit in this court entitled "Katz *vs.* Zeckendorf?

41 A. Yes, sir.

Q. Did you testify in that case?

A. Yes, sir.

Q. Did you testify in regard to the position that Mr. Strauss occupied in your house?

A. I did not.

Q. Was not the question put directly to you as to Mr. Strauss' general management of the firm of L. Zeckendorf & Co., and did you not testify that he was the general manager and had full power to act as such manager?

A. No, sir; neither was any such question of that kind ever put to me.

Q. Did you at that time, September, 1881, at your house, do a banking business, and have you continued to do a banking business from that time until now?

A. No, sir; neither are we now.

Q. Are you not drawing checks on banking houses and receiving checks and discounting the same, and were you not doing so at that time?

A. No, sir.

Q. Will you tell the court in whose handwriting this is—this L. Zeckendorf & Co., in the middle of the back of the note?

A. I think that is Mr. Strauss'; it looks like it.

Q. Did he ever inform you that he placed the name of L. Zeckendorf & Company there?

42 A. No, sir.

Q. Whose handwriting is this at the bottom of the back of the note?

A. Our book-keeper's.

Q. Your present book-keeper?

A. Yes, sir.

Q. Was he your book-keeper at that time?

A. Yes, sir.

Q. At the time that note was made what authority, so far as your house was concerned, did Mr. Strauss exercise?

A. He was our cashier and had charge of our general office business.

Q. Did he ever draw any checks on banks and sign the name of the firm?

A. He did on special banks with special authority.

Q. Was he not in the habit of doing it from the beginning of the year to the end of it?

A. No, sir.

Q. What do you call special authority?

A. To draw checks and sign the firm to them.

Q. Did Mr. Strauss ever enter into a contract on behalf of the firm and sign the name of the firm without consulting you or the other member of the firm on the general authority which he had?

Objected to as an assumption.

COURT: Yes; that is assuming.

43 WITNESS: I told you that he had no general; his authority was special.

Q. Now state what that special authority was.

A. He had some special authority to draw checks, I think, at that time; we were banking with Hudson & Co., and he had authority to sign our name by him.

Judge CAMPBELL: To all papers?

A. No, sir; to checks.

Judge FERGUSON:

Q. Did he not have the authority to make notes and sign the name of the firm as business manager of the firm at that time?

A. No, sir.

Q. Do you know whether he got that $2,800 about that time?

A. I do not.

Q. Do you know I. S. Fried?

A. Yes, sir.

Q. Can you tell whether he was at your house on that day?

A. I cannot.

Q. Do you know whether he took that note from your house on that day and proceeded to get this $2,800?

A. No, sir; I never saw that note on that day.

Q. Did you ever look over your books and see if your firm had credited Tully, Ochoa & Co. with that amount of money prior

44 to Mr. Etchells' coming to see you with the note—about three months ago?

A. No, sir.

Q. You never took any interest in that?

A. No, sir; in looking over the books I never noticed any such entry as $2,800.

Q. Do you remember a conversation which you had with me about the time the suit was commenced in which you said that you were not going to pay that note, though you had charged it on your books to bills payable?

A. I don't remember; I don't think that I did, as it is not a fact.

Q. What authority had Mr. Wittleshoefer in your house in connection with its business?

A. He had none whatsoever; he was simply our book-keeper.

Q. Did you give him authority to draw checks and sign them for your house and draw the money?

A. I don't think that I ever did.

Q. Do you know whether he did so or not?

A. I don't think that he did.

Q. Do you know whether he was authorized by any person to sign the name of the firm on the back of that note?

Objected to. Sustained.

Q. Was he authorized by the firm to do so?

A. Nobody authorized him that had the authority to do so.
45 Q. Do you pronounce that writing on there a forgery?

Objected to.

The COURT: It is sufficient for him to state whether it was done by the authority of the firm or not.

Judge FERGUSON:

Q. In regard to this special power conferred on Mr. Strauss, how was that conferred?
A. He had authority to draw certain checks.
Q. Who gave him that authority?
A. I did.
Q. How did you give it to him?
A. In writing.
Q. Where is that writing?
A. The parties that I drew it for have it.
Q. Who are those parties?
A. Hudson & Co. At this time I think they were the only parties.
Q. Did the First National Bank have any such paper?
A. No, sir.
Q. Did you do business with them?
A. I don't think we did.
Q. Is it in your power to get that paper that you gave the bank into the court at the present time?
A. I think I could get it; I think I copied it.
Q. In your press book?
A. Yes, sir.
46 Q. I would like to have you produce that.
A. Yes, sir; but it will take some time.
Q. The book is indexed, is it not?
A. Yes, sir.

The COURT:

Q. What constitutes the firm of L. Zeckendorf & Co.?
A. Mr. Zeckendorf and myself.
Q. Does he reside here?
A. No, sir; he resides in New York.

Court here adjourned until to-morrow, Wednesday, April 1st, at 10 o'clock a. m.

Court met pursuant to adjournment April 1st, at 10 a. m.

Morning Session.

(Testimony of ALBERT STEINFIELD continued.)

Judge FERGUSON:

Q. Were you frequently absent from the business house of L. Zeckendorf & Co. during the years 1881, 1882, 1883, and 1884?
A. No, sir; very seldom.

Q. Were you absent at all or at any time?
A. Yes, sir; was absent some.
Q. How long?
A. In 1882, about two months.
Q. Where?
A. San Francisco and New York.
Q. Were you absent in 1881?
A. In 1881 I was not out of the Territory.
47 Q. Were you absent from the house of L. Zeckendorf & Co.?
A. I don't think I was for a greater length of time than a day or two.
Q. Were you frequently absent for a day or two at a time?
A. No, sir; I don't think I was.
Q. Were you absent for one or two days at any time during that year?
A. Very likely I was; we had a branch house at Benson, and I would go down there some times.
Q. Where were you on the 17th day of December, the day this waiver of protest was made?
A. I think I was either at Benson or Contention; I don't recollect definitely.
Q. Who was delegated with authority during your absence to carry on the business of Zeckendorf & Co.?
A. There was nobody in particular; I generally arranged my business so that when I left town there was no necessity for any one.
Q. Your house run itself, did it?
A. No, sir; I left it so that it did not need much running.
Q. During the time of such absences were there large money transactions carried on?
—. No, sir; not to my knowledge.
Q. Were checks not drawn very frequently?
48 A. I generally left the checks signed with the book-keeper so he could use them as required.
Q. Who?
A. Either Mr. Strauss or, when he was away, Mr. Felix.
Q. Did you not always leave them with Mr. Strauss, and did he not manage your business during your absence?
A. He had control of our office business.
Q. Did he not frequently during your absence present and sign checks drawn by your firm?
A. He did on Hudson & Co., as I have already stated.
Q. Were those checks left drawn by you?
A. No, sir; he had authority to draw and sign them.
Q. Did he not have authority to settle any financial transactions connected with your house?
A. He had charge of the books.
Q. Did he not have authority to make settlements in all matters pertaining to the house as his judgment seemed to him best?
A. In relation to the business he had charge of; yes, sir.

Q. Was not Mr. Strauss connected with the affairs of L. Zeckendorf & Co. in 1881 the same as he was in 1880 and 1882?

A. I don't think there was any difference.

49 Q. Were you present in the court-room when the case of Katz against Zeckendorf was tried, at which time Mr. Strauss was a witness, and did you hear his testimony?

A. Yes, sir.

Q. Did he not state on that occasion that he was the general manager of the business of Zeckendorf & Co. during the transaction that occurred between your house and the house of M. Katz?

Objected to. Sustained.

Q. If Mr. Strauss testified in that suit that he was the general manager of the business of Zeckendorf & Co. at that time did he testify truly in that regard or did he testify falsely?

Objected to as irrelevant and immaterial. Sustained.

Q. During what years was the business connected with that suit carried on?

A. I think it was during the years 1882 and 1883. I am not positive.

Q. Was it not carried — also in 1883?

A. Yes, sir.

Q. Did Mr. Strauss have any more power to act in matters between Katz and your firm than he did in regard to matters between your firm and other firms; did you give him greater power to act with Katz than you did with other houses?

A. No, sir.

Q. What was his authority?

50 A. Mr. Strauss was in charge of our office. He had general charge of our office. He was our cashier, and the books were under his immediate control.

Q. Was it his business to collect money which was paid into the firm?

A. Yes, if he had charge of that branch.

Q. Did you not have a talk with Strauss in September, 1881, in which you talked over the indebtedness of Tully, Ochoa & Co. to your firm, and did you not also talk over where they could borrow a certain sum of money, and that you desired them to get that money and pay it into your firm?

A. I don't remember any such conversation.

Q. Do you know Charlie Etchells?

A. Yes, sir.

Q. Do you know the plaintiff?

A. I have met him.

Q. Try and refresh your memory whether or not you had a conversation with Mr. Strauss or Mr. Fried, and whether you did not request him to go to Tully, Ochoa & Co. and get their note for the purpose of securing a loan of $2,800, which was to be paid into your firm?

A. I don't remember that.

Q. Do you remember of any conversation you had on that day with Mr. Fried?

A. No, sir.

51 Q. Do you remember that Mr. Fried brought that money to your store?

A. No, sir.

Q. Did any person within your memory bring $2,800 to your store on that day?

(Objected to as immaterial.)

The COURT: If you can show that this money was paid to the endorser of this note by the endorsee you can do so.

(Exceptions taken to the ruling of the court by the defendant.)

Judge F.: Answer the question.

A. I don't think any such sum was paid in, or I should remember it.

Judge FERGUSON:

Q. Look at that paper again (showing); what is that?

A. That is a part of an account rendered by Zeckendorf & Co. to Tully, Ochoa & Co.

Q. Is it not a statement of account from Zeckendorf & Co. to Tully, Ochoa & Co.?

A. It seems to be part of one.

Q. Are not all of the credits against the firm of Tully, Ochoa & Co. found on that paper up to that time?

A. This paper is marked No. 3, on a bill-head of Zeckendorf & Co., and shows part of the debits and credits.

Q. Does not that contain all of the credits given by your house to Tully, Ochoa & Co., commencing with the credit of $2,800?

52 A. I could not tell.

Q. Is there anything that is incomplete?

A. Yes, sir.

Q. Where?

A. Right here (showing).

Q. I am asking as to the credits and not as to the debits.

A. I don't know that to be a fact.

(Objected to as assumption.)

Q. Well, assume that to be a fact.

The COURT: He has identified that as the handwriting of his book-keeper.

Judge FERGUSON:

Q. What books were in your house in September, 1881, in which you made your daily entry of accounts?

A. Ledger, journal, and cash book.

Q. You had a day book and blotter?

A. I never kept a blotter.

Q. What were the minor books?
A. Invoice books, etc.
Q. Did you not have a book in which you kept an account of the notes due by your firm and to your firm?
A. We kept an account of that in our ledger.
Q. Did you not have a small book in which you kept an account of the notes due by and to the firm of Zeckendorf & Co.?
A. I don't think we did.
Q. What were the original entries made in?
A. Day book, cash journal and ledger.
53 Q. They were made in any book?
A. No, sir.
Q. Will you take your cash book and turn to the account of Tully, Ochoa & Co. with L. Zeckendorf & Co.?
A. Do you mean in the ledger?
Q. You can take it first, if you choose, and refer back.

Witness does so.

Q. Now show me the account in this book of September, 1881.
WITNESS: Here it is.
Q. Where is that?
A. On page 92 of the ledger.
Q. Show me where this statement of account was taken from your books on September 17th, 1881.
A. Here it is.
Q. What does that mean?
A. There is a credit there of $2,800.
Q. Then you credited Tully, Ochoa & Co. on that day with $2,800?
A. Yes, sir.
Q. On the 17th of September, 1881, what credit is given Tully, Ochoa & Co.?
A. Bills payable, $2,800.
Q. On what page do you find Tully, Ochoa & Co.'s credit as you have intimated?
A. Page 92, ledger.
54 Q. Please turn to page 331 of your journal to the corresponding item from which that came.
A. Here you are.
Q. Can you find that item in your journal referred to in your ledger?
A. Certainly.
Q. I am asking about that $2,800.
A. You did not ask me that question.
Q. What do you find in regard to that credit of $2,800?
A. The journal entry which corresponds to the ledger entry.
Q. Can you tell where the money came from?
A. No, sir.
Q. Now turn to the day book and give the corresponding entries.
A. This is the original entry.

Q. Please produce your cash book of the date of the 17th of September, 1881.

A. Here it is, page 106 of the cash book.

Q. What do you find there?

A. The entry reads "Sept. 17th, 1881; bills receivable, $2,800."

Q. Did I understand you to say yesterday that you had not credited bills receivable with this amount?

A. I did not say so.

Q. Is there any other book in your system of book-keeping which would contain this entry?

A. No, sir.

55 Q. Will you please send for your day book and blotter of that date?

A. We did not keep any blotter. The only thing that might contain something is the day book.

Q. Well, bring up the day book after dinner. Why was this $2,800 credited to Tully, Ochoa & Co., on your cash book? Did you credit anything on the cash book except for cash received?

A. No, sir.

Q. You must have received the cash on that day?

A. Yes, sir.

Q. Are you able to call to mind from whom you got that $2,800?

A. I am not.

Offered in evidence cash book, page 106; journal, page 331; and the ledger, page 92, of the books of L. Zeckendorf & Co.; admitted; also the statement of account; admitted subject to objection.

Q. Was L. Zeckendorf, one of the firm of L. Zeckendorf & Co., in this city, at the house of Zeckendorf & Co., between the making of that note on the 17th of September and the day on which it came due?

A. No, sir.

56 Q. How often did you make a statement of account and forward it to the New York part of the firm? Is your firm carrying on business in the city and State of New York?

A. We have a place there.

Q. How often does your firm here make a statement of account and forward it to the house in New York?

A. We make monthly statements.

Q. Then a statement was sent forward within thirty days after this transaction, was it not?

A. Yes, sir; certainly. I won't say that it was sent thirty-one days afterwards, but we send monthly statements.

Q. That has been the regular practice down to the present?

A. Yes, sir.

Cross-examination:

Judge CAMPBELL:

Q. Did you know anything about that item at all further than you got from your books?

A. No, sir.

Q. Do you know anything at all about a statement being sent on to your New York firm other than that?

A. No, sir.

By COURT:

Q. Suppose this note had been discounted at the bank, would Mr. Strauss have the authority to sign your name to it?

A. No, sir; if such note had been discounted a different
57 entry would have been made. We would have placed it amongst bills payable as our own paper out.

Q. You say that Mr. Strauss would have the authority to sign the name of you house in such a case?

A. No, sir.

Mr. JEFFORDS: Do you mean, Mr. Steinfeld, that if a note was payable to Zeckendorf & Co. and it was desirable to discount it, that Mr. Strauss would not have the authority to discount?

A. Yes, sir.

Q. If there was nobody here during the time that this was running who could, under the circumstances, have endorsed it?

A. Nobody but myself.

Q. You would have known if the note had been endorsed by yourself?

A. If that had been endorsed by us and discounted there would have been a record made which would have notified us that there was such a note and we were responsible for it.

Q. Please turn to bills payable during those three months.

A. Here it is.

Q. Explain that.

A. This side is where we put entries of notes paid and this other side are where they are issued.

Q. Where is your September, 1881?

A. There were no transactions of that in September.

58 Judge CAMPBELL:

Q. There is no entry in your books of bills payable?

A. There is no entry of that note in bills payable.

ANDREW J. CRONLY, a witness called on behalf of the plaintiff, and after being duly sworn testified as follows:

Q. What is your name?

A. Andrew J. Cronly.

Q. What was your business on the 17th day of September, 1881?

A. Book-keeper for Tully, Ochoa & Co.

Q. In what other capacity did you act as agent, etc.?

A. I was general manager when they were absent.

Q. Will look at that piece of paper (showing paper)?

A. Yes, sir; it is a note of Tully, Ochoa & Co. in favor of L. Zeckendorf & Co. for $2,800.

Q. Will you tell the court if you know who made that note and why it was made?

A. I wrote the body of the note; the signature is in the handwriting of Mr. De Long, one of the partners of the firm of Tully, Ochoa & Co.

Q. For whom did you write that note and at whose request?

A. I wrote it for Tully, Ochoa & Co.

Q. Did any person come to you and state that they knew where $2,800 could be borrowed?

59 A. I think that Mr. De Long attended to that negotiation; no doubt he came to me and told me to make out the note; I thought that the money was to come from Mr. Johnson.

Q. Did Mr. Strauss come to you on that day?

A. No, sir; I think that he went to Mr. De Long; I might have heard part of the conversation.

Q. To whom was that note delivered after it was signed?

A. I think that I gave it to Mr. De Long.

Q. Is it not a fact that you delivered that note personally to Mr. Strauss after writing it out?

—. No, sir; I would not swear that I did; I might have done so, but I would not state positively that I did.

Q. Do you know what became of that note?

A. I think that it was given to Charley Etchells for Mr. Johnson.

Q. I am asking as to how it got away from the house of Tully, Ochoa & Co.?

A. My understanding was that Tully, Ochoa & Co. and Zeckendorf & Co. were to get this money on this joint note.

Q. Didn't I understand you to say or is it not a fact that Mr. Strauss came there on that day?

(Objected to as leading.)

The COURT: If this is an unwilling witness you can lead him.

60 Q. How did that note get away from the house of Tully, Ochoa & Co.?

A. I think I gave it to Mr. De Long.

Q. Did you see him hand it to any one?

A. No, sir.

Q. Look at that paper and see what that is (showing).

A. I saw it about the time it was dated; it is an account of Zeckendorf & Co. against Tully, Ochoa & Co.

Q. Will you look at the statements on that paper and see if you know what that item is credited on September 17, 1881?

A. That is the same note, I think, you have here in this suit.

Q. Look at this book and tell me what it is (showing book).

A. It is one of Tully, Ochoa & Co.'s ledgers.

Q. Of what year?

A. 1882; some of it in 1881.

Q. Turn to page 50 of that ledger and tell me what you find there.

(Objected to as irrelevant.)

The COURT: Let us see what it is.

Exceptions taken to the ruling of the court by defendant.

WITNESS: "September 17th, '81, charged L. Zeckendorf & Co. our note, three months' time."

Q. Is that the original entry?

A. Yes, sir; it is in my handwriting.

61 Q. When you made that entry was it your understanding that the note was made for the benefit of Zeckendorf & Co.?

Objected to, as the note speaks for itself.

Judge CAMPBELL: We object to this whole line of examination.

The COURT: I will admit this testimony, but will exclude it if it is immaterial.

Judge FERGUSON:

Q. Why did you charge them on that day with that note?

A. Because we gave them the note.

Q. Why?

A. For the purpose of raising money.

Q. Did you receive any of the money for Tully, Ochoa & Co.?

A. No, sir.

Q. It was not returned or brought back to that house by any person?

A. Not to my knowledge.

Q. During the time that you were acting as general manager for the house of Tully, Ochoa & Co. how often did you do business with the house of Zeckendorf & Co.?

A. We did business more or less all the time.

Q. Who was their general manager?

A. Mr. Steinfeld.

Q. When he was away did any other person act beside him?

A. When he was away Mr. Strauss generally acted when he was here.

62 Q. Was he here in that year?

A. I think he was.

Q. Do you remember whether Mr. Steinfeld was there on the day that note was delivered?

A. I do not.

Q. Can you call to mind who it was delivered to afterwards?

A. I do not know into whose hands Mr. De Long put it, whether into Mr. Johnson's or Mr. Steinfeld's or into the hands of Mr. Etchells.

Cross-examination:

Judge CAMPBELL:

Q. Now, in regard to this thing, was that made on information given to you by Mr. De Long?

A. I made out the note and gave it to Mr. De Long and then charged it to L. Zeckendorf & Co. I think that Mr. De Long told me that they were going to get some money on it.

Q. He did not say how he was going to get it?

A. No, sir. I presume he told me to charge it to L. Zeckendorf & Co., which I would have done anyhow.

Q. Who was the "them" that he referred to when he said they were going to get some money?

A. I suppose he meant Zeckendorf & Co.

Judge CAMPBELL: Do you recollect whether or not the house of Tully, Ochoa & Co. was largely indebted to L. Zeckendorf & Co.?

A. Yes, sir.

63 Q. To an amount considerably in excess to the amount of that note?

A. Yes, sir.

Q. Is this the original entry in the ledger?

A. Yes, sir; they had no day book.

Q. Did you keep a book of bills payable and bills receivable?

A. They were kept by Mr. Tully in his safe.

Q. And the record of that note is in this book? Do you know who made payments of interest on that note?

A. Tully, Ochoa & Co.

Here court took a recess until 2 o'clock p. m.

Afternoon Session.

C. M. STRAUSS, a witness called on behalf of the plaintiff, after being duly sworn, testified as follows:

Mr. JEFFORDS: State your name.

A. Charles M. Strauss.

Q. Look at that note and tell the court whether you ever saw it before.

A. I don't remember ever having seen it, but I probably did from the fact of having written on the back of it.

Q. Is that endorsement of L. Zeckendorf & Co. your writing?

64 A. Yes, sir.

Q. Will you tell the court the circumstances of that endorsement, how you came to make it, and what authority you had to do so?

A. I don't know as I can tell much about it; it is a matter that occurred pretty near four years ago. I don't remember any circumstance in connection with it, except what I have learned this week from the books.

Q. What were those circumstances?

A. The note was given by Tully & Ochoa, and we credited them with $2,800 in cash on our books. I don't remember anything about it. I can only tell from the books.

Q. You don't know how you came to endorse it?

A. No, sir; I should judge that I endorsed it at Tully & Ochoa's store from a little circumstance which I notice in the peculiarity of the handwriting. The pen that Mr. Cronly used was a large gold pen, and from the appearance of the signature I believe I made it with that pen.

Q. I wish you would state to the court how you came to put the name of Zeckendorf there; what right had you to do so?

A. I would not like to state any more than I have stated; in fact, I knew nothing of the case until the Thursday before the suit was brought, and then I didn't know anything about it until Mr.
65 Fried spoke to me about it. I said that it must have been a forgery, as I knew nothing of it. I never knew Mr. Johnson. I never knew anything about it, and all I know now is what I gathered from the books. Mr. Fried drew my attention to it about the time Mr. Johnson got back. I said that I knew nothing about it. Since then I have tried to remember the circumstance, and all I can remember is the entry in the cash book.

Q. How did you come to put the name of Zeckendorf & Company there; what right had you and what authority had you to do so?

A. I could not tell now. I made a good many signatures at that time.

Q. Did you make any like that?

A. Yes; I suppose I did.

Q. Do you know?

A. I cannot tell any particular case.

Q. You don't know what authority you had; all you know is that you put it there?

A. That is all.

Q. Did you have any authority?

A. I probably did, or else I would not have done it.

Q. Had you endorsed papers of this character before, payable to Zeckendorf & Co.?

A. Yes, sir.

Q. They were taken up in due course of time?

66 A. They probably were. I have never heard of them since.

Q. Was there any objection made by the firm, or did they know when you endorsed notes made in that way?

A. There was none that I know of.

Q. What relation did you stand to them?

A. I was what you might call general manager. I had control of the financial part of the business. I was in the office.

Q. And about that time you made a good many signatures like that?

A. I didn't say that. I said I think so. I have made a good many signatures since I have been there, but farther than that I would not like to state.

Q. Was there any difference in your position there at any other time?

A. No, sir.

Q. And you have endorsed notes payable to them?

A. Yes, sir.

Q. And they were paid after due course?

A. Yes, sir.

Q. And you were the general financial man?

A. Yes, sir.

Q. Was this note delivered to you by Tully, Ochoa & Co.?

67 A. I could not tell you that. We did a business close to a million dollars a year, and I could not locate any particular circumstance.

Q. You don't know whether you got that note at Tully & Ochoa's store or not?

A. I must have got that note in Tully & Ochoa's store. I went up with Judge Campbell and Judge Ferguson to look at the note, and I told Judge Campbell that the note never was in Zeckendorf & Co.'s store that I knew of; whether it got in there afterwards or not I could not say.

Q. Do you know how the money was raised on that note or from whom it was raised?

A. If I ever did know I have forgotten it.

Q. All that you know is that you know that you signed the note?

A. All that I know about it is, that is my writing on the back of the note. I would be willing to state that it was done in Tully & Ochoa's store. I know from the books that Zeckendorf & Co. got so much money from Tully, Ochoa & Co. at that date; the same amount as mentioned in the note.

Q. You are a book-keeper and an expert?

A. Yes, sir.

Q. Do the books in any way show in any entry by which you can tell that that note was received by Zeckendorf & Co. from Tully, Ochoa & Co.?

68 A. No, sir; the books show that Zeckendorf & Co. received the cash for that note; whether the amount was handed to them by Tully & Ochoa or not, the books do not show. Having entered the note, of course I wanted to keep some track of it; I might have taken a memorandum of it when I got the money. After endorsing the note an entry was made in the cash book.

Q. Will you show us the entry in the books that relates to the money having been raised from the note?

A. No; there is nothing there which refers to a note which Tully & Ochoa made for $2,800.

Q. What is there in the books to indicate that?

A. Bills receivable.

Q. If you had any authority specially delegated to endorse this note, from whom would you have taken it?

A. Mr. Steinfeld.

Q. Do you know anything of your own knowledge about this lower endorsement: "We hereby waive protest. Zeckendorf & Co., by Wittleshoefer?"

A. I was not in the city at the time that purports to have been made.

Q. What did you state about your control and management of the financial part of the business?

69 A. I was the manager and had the office business in my charge.

Q. What position does Mr. Wittleshoefer occupy?

A. He is the boo -keeper.

Q. Was he a subordinate of yours, under your control?
A. Yes, sir.
Q. From your knowledge of the business and your connection with it are you not aware that it was — custom for yourself or any of the employés to waive protest?

Objected to on the ground of being too general.

The COURT: Put the question directly.

Mr. JEFFORDS:

Q. While you were connected with the house of Zeckendorf & Co. did you have authority or did you waive protest and non-payment?

Objected to as irrelevant and incompetent.

The COURT: It does not relate to any waiver or any protest by him.

Mr. JEFFORDS:

Q. Do you know whether or not, while you were connected with the business, Mr. Wittleshoefer had any authority or whether he did exercise authority to waive demand and protest of notes and bills?
A. At the time that purports to have been done I was not in the city. I will say that he never had any authority from me to do that.

70 J. WITTLESHOEFER, a witness called on behalf of the plaintiff, after being duly sworn, testified as follows:

Mr. JEFFORDS:

Q. What is your business?
A. I am a book-keeper.
Q. For whom?
A. For L. Zeckendorf & Co.
Q. How long have you occupied that position?
A. Pretty nearly five years.
Q. What was your business on the 17th of September, 1881?
A. The same.
Q. Will you look at this note and tell us what it is?
A. It is a note given by Tully, Ochoa & Co. in favor of L. Zeckendorf & Co.
Q. Look at the writing at the bottom of that note and tell the court what it is.
A. It is a waiver of protest.
Q. By whom?
A. It is my handwriting.
Q. By whom is it a waiver?

Objected to.

The COURT: Proceed with the examination.

Judge FERGUSON:

Q. Whose waiver of protest is that?

Objected to. Sustained.

Q. Who wrote it?

A. It is my handwriting.

Q. Did you write it?

71 A. Yes, sir.

Q. By what authority did you write it?

A. I am not aware of any authority; I didn't want the paper to go to protest.

Q. How did you come to waive protest?

A. I was requested to.

Q. By whom?

A. Several gentlemen.

Q. Who were they?

A. One was Mr. Tully, as near as I can recollect, and Mr. Fried and Mr. Etchells.

Q. Where did you do it?

A. In the office of L. Zeckendorf & Co.

Q. Where was Mr. Steinfeld at that time?

A. I don't think he was in town.

Q. Where was Mr. Strauss?

A. He was not in town.

Q. Who had charge of the business in the absence of these two gentlemen?

A. I don't know of anybody that was particularly placed in charge of the business.

Q. Was the house running itself without a manager?

A. There was no authority placed in my hands.

Q. If you had no authority why did you write on that paper in the name of Zeckendorf & Co.?

72 A. Simply on the representations of these gentlemen, though I insisted at the time that I had no such authority.

Q. How long was Mr. Steinfeld gone?

A. I don't remember.

Q. How do you know that he was absent?

A. I didn't state positively that he was absent, but I think he was.

Q. Is it not a fact that he was at that time in the office when the paper was given to you?

A. I don't believe that he was.

Q. And you signed that without any knowledge from him or Mr. Strauss?

A. Yes, sir.

Q. Did you on the return of Mr. Steinfeld to the store tell him that you had written that?

A. I don't think I did.

Q. Did you tell Mr. Strauss on his return that you had written on the back of that paper "Waiver of protest and demand of payment?"

A. No, sir.

Q. Did you while occupying that position ever write any checks or sign them or endorse them for that house?

Objected to as irrelevant and immaterial.

The COURT: Make your examination full on that point.

Exceptions taken to the ruling of the court by defendant.

Judge FERGUSON:

73 Q. During that time didn't you write checks on Hudson & Co. and didn't you draw money on those checks?

A. That I could not state positively.

Q. If you signed any checks didn't you have the authority to do so?

A. I suppose I did.

Q. From whom?

A. Probably from Mr. Steinfeld.

Q. Did you draw any checks during that time in the name of Zeckendorf & Co.?

A. I don't remember.

Q. Is it not a fact within your knowledge that you did draw checks upon Hudson & Co.'s bank during the year 1881?

A. I could not state positively whether I did or not.

Q. Do you know whether you drew any checks or not?

A. I believe I did at a special time.

Q. What was the limit of that time?

Objected to as immaterial. Overruled. Exceptions.

Q. What limit did you have in which you were authorized to draw checks for that house?

A. I could not tell.

Q. About how long?

A. I could not tell.

Q. As long as twelve months?

A. I don't believe it was.

Q. Was it as long as nine months?

74 A. I could not tell.

Q. Did you at any time, with the authority of Mr. Steinfeld or Mr. Strauss, assume the financial settlement of accounts, notes, or bills presented to the house for collection?

A. I don't remember any such understanding?

Q. Did you ever, while they were absent from the house, when notes were presented for payment, draw checks on the house and pay those demands?

A. I don't remember that I had anything to do with the financial part of the business.

Q. Did you as book-keeper of the house make an entry on the books crediting Tully, Ochoa & Co. with $2,800 on the date that that note was purported to have been drawn?

Objected.

THE COURT: If you wish to question him about those books, call his attention directly to the books.

Q. Well, go ahead.
A. The entry is made by Mr. Strauss.
Q. Who carried it onto the ledger?
A. I carried it to the other books.
Q. Turn to the journal, page 331; what do you find there?
A. This, "Credited to bills receivable."
Q. Under what circumstances did you credit it to bills receivable?
A. This is a cash transaction.
75 Q. Do you ever credit bills receivable when the money is paid?
A. They may settle in different ways.
Question repeated.
A. No, sir.
Q. Did you ever enter waiver of non-payment on a note for that firm before?
A. No, sir.
Q. Did you ever do so since?
A. No, sir.

Cross-examination:

Judge CAMPBELL:

Q. Do you remember what time it was that you drew these checks that you speak of?
A. I cannot remember.
Q. Do you recollect whether Mr. Strauss was here?
A. No, sir; I don't think that I ever drew checks while Mr. Strauss was here.
Q. Do you recollect whether Mr. Steinfeld was here?
A. No, sir.
Q. Do you recollect whether you had any special authority in regard to these matters?
A. The only recollection that I have is Mr. Steinfeld placed my signature in the bank.
Q. Was there any special power given at that time?
A. No, sir.
76 Q. How long was it that you had this power? Was it during the time that this note was running?
A. It may have been in the latter part of 1881, in December.
Q. Do you recollect whether it was or not?
A. I could not state positively.
Q. About how long was it that you continued to draw these checks?
A. Only until Mr. Steinfeld returned.

Mr. JEFFORDS:

Q. Was it at all times during the absence of Mr. Strauss and Mr. Steinfeld that you were authorized to draw checks under limitation of their authority? And, if so, state what it was.

A. I have no distinct recollection when this authority was withdrawn; it was only to sign checks.

Q. Was it to sign checks only?

A. Only to sign checks.

Q. Have you a distinct recollection as to when it was conferred?

A. I think that it was in the latter part of 1881.

Q. You stated, Mr. Wittleshoefer, that these gentlemen that came to you to get you to waive protest understood that you had no such authority?

A. I told them so myself.

77 Q. During the time that Mr. Strauss and Mr. Steinfeld were away, and your signature was in the bank, and notes or bills of the house became due, who took care of them?

A. I had nothing to do with the financial part of the business.

Q. Not when you were drawing checks?

A. No, sir.

Q. What did you draw them for?

A. To facilitate the getting of money when Mr. Strauss and Mr. Steinfeld were away; I didn't draw the money; I simply signed the checks.

Q. The question was this: During the time when you were authorized to draw those checks to facilitate the getting of money what was it for?

A. For the interest of the business.

Q. Who determined when the money was needed in the business, when it was necessary to make these checks?

A. I believe that was left to my judgment.

Q. Now, suppose that a note of the house that was due was presented, what would become of it?

Objected to. Overruled. Exception taken by defendant.

Q. What would become of such a note; would it have gone to protest?

A. I can scarcely say what I would have done in a case of that kind.

78 Q. If a bill drawn on the house which was due had been presented would you have drawn a check to have covered it?

Same objection, ruling, and exception.

Q. Was your authority in writing?

A. The only authority I had was the signature of the bank.

Q. And that was to facilitate the getting of money to be used in the business?

A. Yes, sir.

Judge CAMPBELL:

Q. Was there any written direction to the bank in regard to your authority?

A. I think that there was.

The COURT: If there is any such written directions that is the best evidence as to his authority.

Mr. JEFFORDS:

Q. During the time that Mr. Strauss and Mr. Steinfeld were away, if a bill accepted by the house of Zeckendorf & Co. had fallen due and had been presented, what would you have done in that case?

A. I think I would have paid it in that case.

Q. If a note due was presented, then what would you have done, and what would it have been within your authority to have done?

No answer.

Q. Do you know where Mr. Strauss and Mr. Steinfeld were at the time you wrote this waiver?

79 A. Mr. Strauss was East and Mr. Steinfeld was away; I don't remember where; it was four years ago.

Judge CAMPBELL:

Q. When Mr. Steinfeld was temporarily absent, or Mr. Strauss, were there not arrangements made for all that?

A. Yes, sir.

Q. And did they not give you directions as to the payments which were to be made?

A. As a general thing they informed me what was to be done.

CHARLES ETCHELLS, a witness called on behalf of the plaintiff and after being duly sworn, testified as follows:

Judge FERGUSON:

Q. What is your business?

A. I am a blacksmith.

Q. Will you look at that paper and tell the court whether you ever saw it before or not?

A. Yes, sir; I saw it at the time it was made.

Q. Where did you see it?

A. In my office.

Q. State if any money was given on that paper and the circumstances under which it was given.

A. There was the amount of money given on it that it calls for—$2,800.

Q. Go on and state the circumstances under which that money was given; state who came to you and what request was made and what denial was given, and also as to the taking it with the endorsement.

80 A. Mr. Fried came to me and asked me if I had any money to loan. I asked him how much he wanted, and he said three thousand dollars. I said, On what paper? and he said, Tully, Ochoa & Co. I said I didn't have the money, but I knew where it could be had; but I would not advise the man to loan it on that paper. He then asked me how Zeckendorf & Co.'s endorsement would do. I then told him that I would see the man, and I advised the man to loan the money on that paper, and Mr. Fried came with the note. I told Mr. Johnson about it and he brought the money there. I am pretty sure that he brought it all but a small amount, which I put up. I think that I put up ten dollars. I told Mr. Fried that he didn't have but $2,800, and he said that would do, and he came and got the money.

Q. Who was present when the $2,800 was paid over to Mr. Fried?

A. Mr. Johnson, the plaintiff, Mr. Fried, and myself.

Q. That was in your office?

A. Yes, sir.

Q. You refused positively to loan the money on Tully & Ochoa's credit?

A. I did.

The COURT:

Q. What was it you said to him about Zeckendorf & Co.?

81 A. He asked me if I would loan it on Tully & Ochoa's paper, and when I refused he asked me how Zeckendorf & Co.'s endorsement would do, and I said I would advise Mr. Johnson to loan the money, which he did.

Judge FERGUSON: He brought $2,790 and you let him have ten?

A. Something like that.

Q. When you paid this money over to Fried who got the note and what was done with it?

A. It was given to Mr. Johnson and placed in my safe, I think; I am pretty sure of it.

Q. What did Mr. Fried do with the money at that time?

A. I don't know.

Q. Did he take it away from your place?

A. I think he did; he didn't give it back to me.

Q. He took the money and you took the note and locked it up in your safe?

A. Yes, sir.

Q. You know what he did with that money?

A. No, sir.

Q. This was on the 17th day of September, 1881. Did that note remain in your safe as long as December, 1881?

A. I could not say whether it did or not.

Q. Do you know anything about the writing on the lower part of the back and under what circumstances that was put there?

82 A. At the time that this note was given I told Mr. Johnson——

Q. Just tell what you know of the waiver of protest.

A. I told him, "You have an endorser, and at the expiration of 90 days you tell me and I will go and have them waive protest or get the money." He told me on the day that the note was due, and I took it to Tully & Ochoa first and demanded the money, and he wrote his name on it; I think that it was on the day that the money was due; then I took it to Zeckendorf & Co. I presented it to some one at the table in the front office; I think it was Mr. Strauss; and he, or whoever it was, directed me to Mr. Wittleshoefer.

Q. Where was he at the time?

A. He was in the inner office.

Q. You presented it to Mr. Wittleshoefer at the request of somebody who had charge of the main office?

A. That is my impression.

Q. When you presented that note what was said?

A. Nothing was said except to write waiver of protest on it.

Q. Was nothing said?

A. Nothing that I remember.

Q. Who went in with you?

83 A. I went in alone. He said nothing in regard to the note when he signed his name.

Q. Did Mr. Wittleshoefer say anything in regard to his authority to sign that paper?

A. No, sir; if he had I would have told Mr. Johnson about it.

Q. Did he tell you that he had or had not authority to sign that paper?

A. No, sir; he said nothing.

Q. Did you hear any conversation between him and any person when he signed that paper?

A. Not that I remember of.

Q. Was he within hearing of the person that told you to take it in to him?

A. I think that he was.

Q. And you simply presented it without a word being said and he endorsed it without any conversation?

A. I heard no conversation that I recollect of; it was a long time ago, and it was not my own business; he didn't say anything to me about it.

Q. Can you call to mind who it was in the office that directed you to go to the book-keeper, Mr. Wittleshoefer?

A. No, sir.

Q. Where was the person sitting—in the front office?

A. It was my impression that he was sitting there.

Q. Whereabouts in the office?

A. In the main office, in the usual place.

84 Q. Between the table and the stove?

A. I think it was.

Q. When you first went into that office what did you do and who was with you?

A. I presented the note to whoever was sitting at the table; it was either Mr. Steinfeld or Mr. Strauss.

Q. When you presented the note what was said?

A. It is my impression that I was sent in to Mr. Wittleshoefer by the person who was sitting there.

Q. Did you consider the person who sent you in a person of authority?

Objected to as an opinion of the witness.

The COURT: He has said that it was either Mr. Steinfeld or Mr. Strauss.

Judge FERGUSON:

Q. Were you well acquainted with Mr. Steinfeld and Mr. Strauss at that time?

A. Yes, sir.

Cross-examination:

Judge CAMPBELL:

Q. What part of the store was it in?

A. In the main office, where they are now.

Q. Do you recollect whether Zeckendorf had at that time moved into that store or not?

A. Yes, sir; they had.

85 Q. Do you recollect when they moved in?

A. No, sir.

Q. Can you remember whether Mr. Tully was with you or not?

A. I think that he was not.

Q. Are you certain of it?

A. No, sir.

J. S. JOHNSON, a witness called on behalf of the plaintiff, after being duly sworn, testified as follows:

Judge FERGUSON:

Q. Do you know anything about that paper (showing the note sued on)?

A. Yes, sir.

Q. You are the plaintiff in this action?

A. Yes, sir.

Q. Will you state to the court now the circumstance connected with the receipt of that note and its getting into your possession?

A. Mr. Fried brought it to me. I handed him the money and he gave me the note. I then took it to Mr. Etchells and he put it in the safe.

Q. Where did he hand you that note?

A. In Mr. Etchells' office.

Q. How much money did you give him?

A. I gave him $2,800.

Q. Where did you get the money?

A. I worked for it.

Q. Where did you get it that morning?

86 A. Out of Hudson & Co.'s bank. I did not have quite $2,800 and Mr. Etchells advanced me some.

Q. Did you count that money?

A. Yes, sir.

Q. Who helped you count?

A. It was counted in Mr. Etchells' office by Fried, Etchells, and myself. We were all three present.

Q. Has that note ever been paid any further than is shown by these endorsements on the back of it?

A. No, sir.

Q. It is still due and owing to you?

A. Yes, sir.

Q. Did Mr. Fried take that money away from there?

A. He did.

Cross-examination:

Judge CAMPBELL:

Q. Who made payments of interest on that note?

A. Mr. Cronly and Tully.

I. S. FRIED, a witness called on behalf of the plaintiff, after being duly sworn, testified as follows:

Q. What is your business?

A. I am secretary of the gas company.

Q. What was your business in December, 1881?

A. Real estate and mining broker.

87 Q. Will you look at that paper and tell the court what it is and whether you ever saw it before, and if you did when was the first time?

A. I cannot tell you, but the money was loaned on that paper by Mr. Johnson to Tully, Ochoa & Co.

Q. When did you see that paper for the first time?

A. September 17th, 1881.

Q. Who gave it to you?

A. I could not remember.

Q. It was placed in your hands for some purpose?

A. Yes, sir.

Q. Who placed it there and for what purpose?

A. Mr. Johnson came to me to loan $2,800, probably two or three months before, that belonged to his wife and sister-in-law; I asked them what they wanted, and they said one and one-half per cent., and whatever I could get over that would be my *pro rata*. At that time Tully, Ochoa & Co. were indebted to Zeckendorf & Co., and they were trying to get payment. I cannot say whether it was Mr. Strauss or Mr. Steinfeld, but I think that it was Mr. Strauss, that said they would like to have Tully, Ochoa & Co. right their indebtedness. I told him that there was a blacksmith that had $2,800 he would loan with Zeckendorf & Co.'s endorsement.

88 Q. To whom?

A. To Tully, Ochoa & Co., of course; some of the firm of Tully, Ochoa & Co. asked me if I could get them a loan, and I told them I could with Zeckendorf & Co.'s endorsement. The note was handed to me, and I took it down to Charlie Etchells and he drew the money and paid it to me. I didn't draw it; I left it in Hudson & Co.'s Bank, as near as I can remember.

Q. After this note was in your hands what was the first thing you did?

A. The note was taken and Charlie Etchells got me $2,800.

Q. Did you get it there?

A. No, sir; Etchells said, The money is not here; it is in Hudson & Co.'s Bank.

Q. Did not Mr. Etchells tell you that the money was in the bank, and did he not tell Mr. Johnson to go up and get it, and did not Mr. Johnson go and get the money and bring it down?

A. I think not; I think I went up to the bank and the money was all there; still it might have been paid down at Etchells' office.

Q. You got the $2,800?

A. Yes, sir.

Q. What did you do with it?

A. It was left to the — of Tully, Ochoa & Co., my impression is.

89 Q. It might have been true that the money was given to you at Charlie Etchells' office?

A. It might have been, but my impression is that it was given to me at the bank.

Q. Were you at that time, or about that time, in the employ of Zeckendorf & Co., collecting bills?

A. No, sir; I was in nobody's employ; they paid me brokerage.

Q. Did you receive any money?

A. I got $42, ½ per cent. on $2,800 for 90 days.

Q. What did I understand you to mean when you said that Mr. Strauss was the financial manager of the firm of Zeckendorf & Co.?

A. I meant to say that he attended to their business in drawing checks; he was the financial man and attended to the office work.

Q. You were pretty well conversant with the house, were you not?

A. Yes, sir; I used to be there at one time.

Q. What are your means of knowledge that Mr. Strauss was in any way connected with the financial part of the business?

A. I don't pretend to be an expert. Supposing the house wanted five or ten thousand dollars, Mr. Strauss was the man that raised the money, and if there was any money to loan he attended to that part of the business. If you called there Mr. Steinfeld referred you to Mr. Strauss.

Q. How do you know?

90 A. Because it happened to me. I went there to buy Mexican silver or to get exchange, and Mr. Strauss attended to that.

Q. What do you mean by attending to that business?

A. If you wanted to draw on New York or San Francisco you would go to Mr. Strauss to get the draft.

Q. Who would sign it?

A. Mr. Strauss.

Q. Mr. Steinfeld referred you to him as the financial manager?

A. If I called there on any business in regard to finances he would send me to Mr. Strauss.

Q. Now, if you had money to loan or wanted exchange, who would that be settled by?

A. At that time Mr. Strauss attended to it. I would go to Mr. Strauss instead of Mr. Steinfeld.

Q. Did he ever give you bills of exchange?

A. Yes, sir.

Q. Without going to Mr. Steinfeld?

A. Yes, sir.

Q. You would get them from Mr. Strauss?

A. Yes, sir; I would go to him and say I wanted five thousand dollars on San Francisco, and ask if he had the exchange, and he would give it to me.

Q. Who would draw the exchange?

91 A. Mr. Strauss.

Q. Who would sign it?

A. Mr. Strauss.

Cross-examination:

Judge CAMPBELL:

Q. Can you recollect whether Mr. Strauss then drew bills of exchange on New York, or whether he signed them?

A. He signed them on San Francisco, to my knowledge.

B. M. JACOBS, a witness called on behalf of plaintiff, after being duly sworn, testified as follows:

Mr. JEFFORDS:

Q. Do you know Charles M. Strauss?

A. Yes, sir.

Q. Do you know Albert Steinfeld?

A. Yes, sir.

Q. Do you know Mr. Wittleshoefer?

A. Yes, sir.

Q. What is your business?

A. Banking.

Q. In Tucson?

A. Yes, sir.

Q. Do you know whether Mr. Wittleshoefer has ever drawn checks in the name of the firm of L. Zeckendorf & Co.?

Objected to as irrelevant.

92 The COURT: Mr. Wittleshoefer has testified as to that point, that they were drawn at the other bank; go ahead.

Exceptions.

WITNESS: I don't remember positively whether he did or not; I remember his endorsing checks and signing receipts for money paid them.

Q. Endorsing checks, what do you mean by that?

A. I mean endorsing the name of the firm; for instance, if they would come in our bank with a check he would sign it L. Zeckendorf & Co., by Wittleshoefer.

Q. You say you cannot remember positively whether there were any instances of that kind or not, or whether he endorsed any papers for collection?

A. I am positive that he endorsed the name of the firm on papers drawn in their name; whether the checks were on our bank or on another institution I don't remember.

Judge CAMPBELL:

Q. What other institution are you alluding to—Hudson & Co.?

A. I suppose that would be about the only other institution there was in town.

JEFFORDS:

Q. Do you know whether he endorsed any paper payable to them, or anything of that kind?

A. That is a matter that would not come to my knowledge; we would only have drafts drawn on us to their order; drafts drawn by them on somebody else. I remember one time Mr.
93 Strauss and Mr. Steinfeld were away, and I went down there and Mr. Wittleshoefer gave me a check and signed a receipt in the name of the firm, and once he came to our bank and endorsed the name of the firm.

Q. Was there any objection to that by the firm?

A. We never heard of any.

Cross-examination:

Judge CAMPBELL:

Q. You say the only two instances that you recollect were while Mr. Strauss and Mr. Steinfeld were away; one instance was where he drew a check, and the other was when he endorsed the name of the firm?

A. I believe he endorsed a check payable to their order.

Q. When was that?

A. I don't recollect.

Q. Can you recollect whether that was in 1881, 1882, or 1883?

A. I could not; it was within five years.

Q. You were never given any authority to cash checks drawn by Mr. Wittleshoefer?

A. No, sir.

Mr. JEFFORDS:

Q. Or to pay checks drawn in their favor endorsed by him?
A. No, sir.

94 EDWARD HUDSON, a witness called on behalf of the plaintiff, and after being duly sworn, testified as follows:

Mr. JEFFORDS:

Q. What position did you occupy in September, 1881?
A. Cashier of Hudson & Co.'s bank.
Q. In this city?
A. Yes, sir.
Q. Cashier of Hudson & Co.'s bank?
A. Yes, sir; it might have been Safford & Hudson then; I don't remember the exact day of the change.
Q. It was the bank that was made Hudson & Co.'s bank afterwards?
A. Yes, sir.
Q. Tell the court whether in your position you have any knowledge of whether Mr. Wittleshoefer, in the house of Zeckendorf & Co., ever drew any checks in connection with that banking house at that time.
A. I don't know at that time, but he has on certain occasions drawn checks when Mr. Strauss and Mr. Steinfeld were away.
Q. Try and refresh your memory as to the latter part of September, 1881.
A. I don't think that he drew any as early as that; I would not swear positively.
Q. He was in the habit of drawing checks there during the absence of Mr. Straus and Mr. Steinfeld?
95 A. I think that it was twice that he had that authority.
Q. And that authority was left in your bank?
A. In the signature book, that Mr. Strauss and Mr. Steinfeld authorized the signature.
Q. What knowledge have you as to the authority of Mr. Strauss?
A. I think from the time of Mr. Strauss' arrival up to the date of his leaving he transacted all of the financial business of the house.
Q. And whenever he signed for the house were the papers received by your house?
A. Yes, sir.
Q. Were they ever questioned?
A. No, sir; we had his signature and never questioned it until it was revoked.
Q. Was Mr. Wittleshoefer's signature ever revoked?
A. Yes, sir.
Q. When?
A. I don't remember; it was a special signature; whenever they were going away it was authorized and when they returned it was revoked.

Q. Will you take this book and tell the court what it is?
A. It is the cash book of Safford, Hudson & Co.
Q. Will you turn to the account of J. S. Johnson of the 17th of September, 1881?
A. Check drawn, $2,790.
96 Q. Was that money in your bank?
A. Yes, sir.
Q. State whether at the time that this $2,790 was drawn out, was it redeposited to the account of Tully, Ochoa & Co. or to the account of Zeckendorf & Co.?
A. It was not deposited to the account of either.
Q. Have you examined your ledger in regard to that?
A. Yes, sir; to within the last few days.
Q. Was there any money left to either of the accounts of those firms growing out of this transaction?
A. No, sir.

By COURT: Did both of these houses do business with your bank?
A. Yes, sir.
Q. Did either of these houses make deposits on that day of that sum of money?
A. No, sir.

Cross-examination:

Judge CAMPBELL:

Q. You speak of occasions when Mr. Wittleshoefer was authorized to draw checks. Can you recollect when?
A. I think that it was on two trips that Mr. Strauss made East.
Q. Was it when anybody was absent from the house?
97 A. I think it was twice when Mr. Strauss was away.
Q. The authority was given and was afterwards withdrawn?
A. Yes, sir.
Q. And that was simply to draw checks?
A. Yes, sir.

ALBERT STEINFELD, recalled, testifies as follows:

Q. This note was presented and payment demanded on it shortly before this suit was brought?
A. Yes, sir; shortly.
Q. You saw it was endorsed?
A. I saw it and examined it.
Q. And refused to pay it?
A. Yes, sir.
Q. At that time did you examine your books, and were you conscious of the entry which shows that $2,800 came into your house on that note from Tully, Ochoa & Co.?
A. No, sir.
Q. You did not examine your books in respect to it?
A. No, sir; not that I remember of.

Q. Did you ever examine your books after this note was presented to you?

A. Yes, sir.

Q. Did you look to see if there was anything come to Zeckendorf & Co. on the day that you got the note from Tully, Ochoa & Co.?

98 A. I saw that entry which we have been looking at, and also where a like amount, which I conclude was an offset to this note.

Q. Will you turn to your books and show us where a like amount was charged there?

A. Page 92 of ledger; November 4th; check on Bank of California charged to Tully, Ochoa & Co.

Q. Did you ever make any inquiry as to what became of this money?

No answer.

The Court: What does this refer to in the journal?

A. Page 107, same entry.

Mr. Jeffords:

Q. There is nothing in that second entry that indicates that it has any reference to this?

A. Simply the same entry; that is all.

By Court:

Q. I was laboring under the impression that this credit to Tully, Ochoa & Co. was on the 17th of the month.

Judge Ferguson: Yes, sir; the first for $2,800 is; the second one for like amount is nearly two months later—on the 4th of November.

Mr. Jeffords: Yes sir; that is on the 17th; that is a credit by note; the other is an independent item altogether.

Q. To witness: Then you never paid any portion of this note when it was presented to you before this suit was brought?

99 Objected to as an assumption.

The Court: Let him state it, subject to objection.

Mr. Jeffords:

Q. You never paid this note or returned any portion of the $2,800 before this suit was brought?

A. I refused to pay.

Cross-examination:

Judge Campbell:

Q. You say that this note was presented to you shortly before this suit was brought?

A. Yes, sir.

Q. Do you recollect by whom it was presented?
A. I think it was Charlie Etchells.
Q. Did you before the presentation of this note have any knowledge or any idea that this note was in existence?
A. No, sir.

Mr. JEFFORDS:

Q. Were you at home on the 17th of September, 1881?
A. Yes, sir.
Q. Were you at home on the 17th day of December, 1881?
A. No, sir.
Judge CAMPBELL: Was that note presented to you, either for the purpose of having it paid or having protest waived?
A. No, sir.

100 Objected to.

The COURT: This is a case that I desire to be fully presented by argument. State your objections.

Judge CAMPBELL: We object on the ground that there is no foundation in this case by which this note can be introduced in evidence as against Zeckendorf & Co. There is no proof of any authority on the part of Wittleshoefer to waive protest upon the note. He denies it; Mr. Strauss has denied it, and Mr. Steinfeld has denied that he ever had any such authority, and there is no proof that he had any such authority whatever from anybody connected with the house of Zeckendorf & Co.

The COURT: He states in his evidence that he had a special authority conferred on him in the latter part of December, 1881. There is nothing fixed or certain about it.

Judge CAMPBELL: There is no authority whatever to protest the note.

Court here adjourned until to-morrow, Thursday, April 2d, 1885.
Court met pursuant to adjournment, Thursday, April 2d, 1885.

Morning Session.

I. S. FRIED recalled and testified as follows:

Mr. JEFFORDS:

Q. Is that the note that was shown you yesterday (showing paper)?

101 Note offered in evidence.

A. Yes, sir.
Q. Look at what purports to be a waiver of protest on it and tell the court who made it, what you know about it.
A. I know nothing about it. I was not present when that was written.

Judge CAMPBELL: I will not argue the admission of the note until all of the testimony is in.

Note admitted in evidence, subject to objection, and marked Plaintiff's Exhibit "A," a copy of which is hereto annexed, p. —.

Plaintiff rests.

JOHN PRINCE, a witness called on behalf of the defense and after being duly sworn, testified as follows:

Judge CAMPBELL:

Q. What is your business?
A. Carpenter and builder.
Q. How long have you resided here?
A. Five years, within a few days.
Q. Did you have anything to do with the building where Zeckendorf & Co. carry on their business?
A. I had charge of the business.
Q. When was it built; when did they move into it?
A. It was commenced September 19th, 1881, and it was
102 finished either February 26th or March 5th, 1882. I have it in my time book, but I cannot tell within a week.
Q. Was there anything to be done to it still before it was fit for occupancy?
A. We made four tables at the shop.
Q. When was it built ready for occupancy?
A. When I left it there was some little to do. The tables were finished about the 23d of March.
Q. Do you know when they moved into the building?
A. They were moving in for some two or three weeks.

By COURT:

Q. What place did they occupy before they moved in there?
A. That place where the hole is dug out across the street.

Judge CAMPBELL:

Q. Do you remember in building this building you put the counting-room or office in for them or not?
A. Yes, sir.
Q. Was that upon the same plan or style of the old one?
A. It was not anything like it at all.
Q. Did you put that one in there?
A. Yes, sir.
Q. You prepared the material for it?
A. I put it up.
Q. There is a great deal of window sash?
A. Yes, sir.
Q. Is that all new?
103 A. Yes, sir.
Q. The old counting room was not moved from the old place into the new?
A. No, sir.

Mr. JEFFORDS:

Q. Do you remember whether the old counting room was composed of one or two rooms?

A. I think there was only one room, although there might have been two; I would not be positive.

Judge CAMPBELL:

Q. Did Mr. Steinfeld move his office over there before you left?

A. No, sir.

ALBERT STEINFELD recalled for the defense, and testifies as follows:

Judge CAMPBELL:

Q. State as to the time that you went into your new building and when it was completed.

A. We commenced moving about the first part of March, and we were three weeks moving; we moved completely about the 10th or 12th of April, 1882.

Q. Do you recollect whether you had an opening day there?

A. Yes, sir; it was some time in April, after we had been in there some time.

Q. Will you state whether there was any similarity in the office arrangement of the old and new buildings?

104 A. There was no similarity whatsoever; the office that was occupied in the old building was a portion of the store; we had a little railing around and a desk inside of that railing; there was a smaller partition, just large enough for the book-keeper to be in.

Q. What part of the store was that set in?

A. Just as you came in the door, right by it.

Q. Did you at any time have this note handed or shown to you by any one up to this time of the demand of payment, just before the commencement of this suit?

A. That was the first time.

Q. Did Mr. Etchells come to you at any time to get any waiver of protest, or to any of your establishment, so far as you know?

A. No, sir.

Q. Were Tully, Ochoa & Co., during the entire year of 1881, in an insolvent condition?

A. Yes, sir.

Q. Were their means extensive?

A. Yes, sir; their means were very extensive; they were considered a very reliable firm at that time.

Q. Up to what time did that continue?

A. Through all of 1882.

Q. You would have had no difficulty in attaching property of theirs sufficient to indemnify you against that note?

A. No, sir.

105 Q. Did your house loan them considerable sums of money after this transaction?

A. Yes, sir.

Q. Can you specify the occasion on which you authorized Mr. Wittleshoefer to draw checks on Hudson & Co. and the Bank of California; can you specify these occasions?

A. Yes, sir; I think I can.

Q. For how long was he vested with authority of that description?

A. There were two occasions when he had this authority; one lasted about five or six weeks at the outside, the other one was of about two weeks' duration; this last one was considerable time after this transaction.

Q. Was that during your absence from town?

A. Yes, sir.

Q. You never gave him any authority to endorse notes or to waive protest or demand on the note?

A. No, sir.

Q. Then you gave him authority to pay those things that you made provision for paying before you went away?

A. Yes; I would go over with him and designate what payments were to be made and would leave signed checks to be used as required.

106 Cross-examination:

Mr. JEFFORDS:

Q. You say that the extent of your old office was a railing in the front part of the store, with a small railing just large enough for the book-keeper to be in?

A. Yes, sir (describes by pantomime).

Judge CAMPBELL:

Q. Was there any partition at all?

A. No, sir.

Mr. JEFFORDS:

Q. Did the cashier have a desk there, too?

A. There was another little desk here (showing).

Q. Who was that occupied by?

A. A man that we had attending to the cash.

Q. Was there any desk there occupied by Mr. Strauss?

A. He would occupy that at times.

Q. Was there a desk there occupied by you?

A. No, sir; I had a desk at the back of the building.

Q. Did you never use that desk you speak of?

A. No, sir.

Q. I presume that you were frequently inside of that railing?

A. Yes, sir.

Q. Did you ever take a seat over to the little railing?

A. There was a seat there, but there was a man occupying that for receiving cash.

107 Q. Was he there all of the time?

A. When he went to meals some one else took his place.

Q. Did you ever do it?

A. I cannot say.

Q. Mr. Strauss did?

A. Yes; but I don't think that he ever received cash.

Q. Do you recollect whether you ever occupied it or not?

A. I may have went into the office and counted our coin, but I don't remember of sitting there.

Q. But you may have occupied that desk for a short time?

A. I don't think so.

The COURT:

Q. Did you know of the existence of this note before it was presented just before this suit was commenced?

A. No, sir.

C. M. STRAUSS recalled on behalf of the defense, and testified as follows:

Judge CAMPBELL:

Q. I will ask you whether Mr. Etchells or anybody else ever presented that note to you after its execution?

A. No, sir; not that I remember of.

Q. Did you ever refer Mr. Etchells or anybody else to Mr. Wittleshoefer in reference to that note?

108 A. No, sir; at the time the note was due I was in New York.

Q. You were in New York at that time?

A. Yes, sir.

Q. What place in the old office did you occupy?

A. I don't think that Mr. Steinfeld was explicit enough in regard to the office; that building was an old adobe building. The walls are still standing. It ran from Pennington street to where the William Zeckendorf store now is. The corner on the Pennington-street side formed something like that (showing); in that was Mr. Wittleshoefer. The young man Felix sat here (showing). There was a door leading into the street in the center of the office. As you came in from the store you had to turn to the right, and a stranger would not notice any office at all, as there is nothing to indicate an office except a slight railing.

Q. What were the rules of the house, if you and Mr. Steinfeld were both going to be absent, as to payment of matters to the firm?

A. Those matters came under my supervision except when I was absent. I never left without making provision for the payment of all claims during the time that I would be gone, every provision, except I left Mr. Steinfeld there, in which case he did the same thing.

Mr. JEFFORDS: Where was the opening where you went into this railing?

109 Witness shows on local diagram.

Judge CAMPBELL:

Q. Where was the store kept on the 17th of September, 1871?
A. In the old store.
Q. You never referred Mr. Etchells to Mr. Wittleshoefer?
A. No, sir; I was not here at that time.
Q. And nobody came to you to make any demand in any shape?
A. No, sir.

The COURT:

Q. Did you ever direct the book-keeper, while you were present, to sign the name of Zeckendorf & Co.?
A. No, sir.

Judge CAMPBELL:

Q. If there was to be a waiver of protest of a note while you were present who would have done that?
A. I would.

EDWARD HUDSON recalled for the defense and testifies as follows:

Judge CAMPBELL:

Q. You stated that on two occasions Mr. Wittleshoefer was authorized to draw checks in the name of Zeckendorf & Co.?
A. Yes, sir.
Q. Did you understand that he was authorized to make a loan or endorse accommodation papers or anything of that kind?
A. No, sir; simply to draw checks on the deposit account.

110 By COURT:

Q. Did you ever discount any paper for that house which was signed by Wittleshoefer for Zeckendorf & Co.?
A. Not that I know of.
Q. Would your books have shown if you had?
A. No, sir; they would have shown Zeckendorf & Co. as an endorser.
Q. If a check is drawn in favor of a firm and the clerk of the firm is sent with it to the bank, is it the custom of the clerk to sign the firm name if he is sent to deposit it?
A. It is the general custom of banks that any one can endorse a deposit.

JEFFORDS:

Q. Is there any custom here or elsewhere where a clerk endorses when the money is drawn?
A. When the money goes out of our hands we are particular to see that the party endorsing has authority to do so.

Q. What was the financial condition of Tully, Ochoa & Co.; did they have any property or did they carry on a large business?
A. Yes; they were carrying on a large business and had considerable property.

The COURT:

Q. What was their standing on the 17th of September, 1881?
A. They were considered the same as others. It was our custom not to take any one name on a note. I suppose we consid-
111 ered them the same as others. I know at that time we were in the habit of taking their paper with endorsers.
Q. To any considerable amount?
A. Yes, sir; I don't know as we did after that time, but I know that we did before that time.

W. A. SCOTT, Jr., a witness called on behalf of the defence, and after being duly sworn, testified as follows:

Judge CAMPBELL:

Q. What was your business during the year 1881?
A. The banking business.
Q. What bank?
A. Pima County Bank.
Q. Who was president of that bank at that time?
A. My impression was that it was Mr. Tully.
Q. Do you know what his financial standing was in 1881?
A. Up to the time that he resigned from the bank I was pretty well acquainted with his financial affairs, and his income was quite large.
Q. When was that?
A. I think it was in 1881—about four years ago.
Q. His means were very large?
A. So reported to me; yes, sir.
Q. He carried on a large and extensive business here, did he not?
A. Yes, sir.
112 Q. And that business was carried on by him up to 1882?
A. Yes, sir; up until he left the bank.

The COURT:

Q. What was the financial condition of Tully, Ochoa & Co. in the latter part of 1881?
A. Up to the failure Tully, Ochoa & Co. were considered very good.
Q. Do you recollect whether the firm of William Zeckendorf failed after the firm of Lord & Williams?
A. Yes, sir; Lord & Williams failed in October, 1881.
Q. And up to that time Tully & Ochoa were in good standing?
A. Yes, sir.

Cross-examination:

Mr. JEFFORDS:

Q. Do you know whether or not, in 1881, Tully, Ochoa & Co. had involved their property to a large extent?

A. Only from hearsay.

Q. Then you are not prepared to state what their standing was if their indebtedness was paid up?

A. They secured large advances of money and paid big interest and notes.

The COURT:

Q. Do you know whether they paid their liabilities as they became due?

113 A. No, sir; that was not the custom of the country; it was the custom to take a new note.

Q. You say that they paid a large rate of interest. Is that an indication of the good standing of the house?

A. Mr. Tully answered that question by saying he owned large bands of cattle and had to turn them quick and could afford to pay the interest to get the money to do it with.

Defendant rests.

EDWARD HUDSON recalled in rebuttal.

Mr. JEFFORDS:

Q. I believe you stated that the signature of Mr. Wittleshoefer was put in the bank?

A. Yes, sir.

Q. Has it ever been revoked?

A. It was never revoked in this book, but at the time that it was given I understood that it was limited.

Q. What book is that?

A. The signature book (read to the court), as per Exhibit C, hereto attached.

Judge CAMPBELL:

Q. Who signed that?

A. Mr. Steinfeld.

Q. This is the authorization to Mr. Strauss above?

A. Yes, sir.

Q. Was that ever revoked?

A. Yes, sir; August 20th, 1883.

Q. Read it.

114 A. "August 20th, 1883, we cancel the signature of C. M. Strauss." A. Steinfeld.

JEFFORDS:

Q. You saw that at the time that it was done?

A. I don't remember.

Q. Did you ever refuse a check presented by Mr. Wittleshoefer?
A. No, sir; I would say that I was not paying teller. Mr. Fry was paying teller.
Q. Do you know how the cancellation of Mr. Strauss' came to be made?
A. I think that I went to Mr. Steinfeld when Mr. Strauss left their house—he had severed his connection with the house—and I suppose he did not want to have his signature in the bank, and he came over and cancelled it.
Q. And then he saw that whole page on the book, did he not?
A. I suppose so.

The COURT:

Q. Was there anything said about the other?
A. No, sir.
Q. Do you recollect whether he came over to the office to cancel the signature or whether he was in the office at the time?
A. I don't recollect exactly.

Case closed for argument.

115 TUCSON, *October 5th*, 1885.

I hereby certify that the above is a correct transcript of my short-hand notes taken at the trial of the above-entitled cause.

W. H. WESCOATT,
Official Court Reporter, First Judicial District, A. T.

EXHIBIT "A." Showing note in controversy, with the endorsements on the back thereof, as follows, to wit:

(Copy.)

"Dolls. 2,800. TUCSON, A. T., *Sept. 17th*, 1881.

"Three months after date we promise to pay to the order of L. Zeckendorf & Co. twenty-eight hundred dollars, at two per cent. interest per month, value received.

"TULLY, OCHOA & CO."

Endorsements on note.

Dec. 17th, paid on within one hundred and sixty-eight (168) dolls., int. up to Dec. 17th, 1881.
March 25th, paid on within (168) one hundred and sixty-eight dolls.
Paid on this three hundred and fifty (350) dollars Dec. 21st, 1882.
Paid on within (154) one hundred and fifty-four dolls. Feb. 23d, 1883.
116 Paid on within (168) one hundred and sixty-eight dolls. March 27th, 1883.

L. ZECKENDORF & CO.

Received Nov. 7, 1883, one hundred and ninety dollars (190).
We hereby waive protest.
Tucson, A. T., Dec. 17, 1881.

L. ZECKENDORF & CO.
J. WITTELOBF.

EXHIBIT "C." From signature book of banking house of Safford, Hudson & Co. and Hudson & Co., Tucson, Arizona.

"From this date, August 20, '83, we cancel this signature.
L. ZECKENDORF & CO.
STRAUSS."

L. ZECKENDORF & CO. "We authorize this signature.
L. ZECKENDORF & CO."

"L. ZECKENDORF & CO.
WITTLESHOEFER." "We authorize this signature until further notice.
L. ZECKENDORF & CO."

117 No other or further evidence was given in the cause. The case was then argued by the counsel for the respective parties, and submitted to the court. On the 26th day of September, A. D. 1885, the court made the findings now on file in the cause in the office of the clerk of this court, which findings are considered as and form a part of this statement and are incorporated herein, and a copy of which may be inserted in or annexed to and shall form a part of the transcript on appeal in the event of either party desiring to appeal from any order of the court hereafter to be made from the decision of the court on the motion for a new trial. The defendants, Zeckendorf and Steinfeld, having duly filed and served their notice of motion for a new trial, and the time for preparing a statement on the motion having been from time to time extended until the — day of January, 1886, the defendants now make their motion for a new trial on the following grounds:

Insufficiency of the evidence to justify the decision of the court and the findings herein in this, that there is no evidence in the cause to justify the 4th finding. The evidence did not show that the defendants, Tully, Ochoa and Co. and L. Zeckendorf & Co., caused said promissory note to be delivered to the plaintiff in consideration of the loan of two thousand eight hundred ($2,800.00) dol-
118 lars. No such loan was ever made by the plaintiff to Tully, Ochoa & Co. and L. Zeckendorf & Co., and there is no evidence — the case tending to show it. The loan was made to Tully, Ochoa & Co. upon their note endorsed by Strauss in the name of L. Zeckendorf & Co., and the money thereon obtained was applied to their, Tully, Ochoa & Co.'s, use. This fully appears from the testimony of Chas. Etchells, the plaintiff's agent and witness, beginning at the commencement thereof and ending "This was on the 17th day of September, 1881;" also from the entire testimony of the plaintiff;

also from the testimony of I. S. Fried, beginning at the commencement and ending with the words "It might have been, but my impression is that it was given to me at the bank." This also appears inferentially from the second additional finding. Cronly also testifies that Tully, Ochoa & Co. paid the interest on the note.

The evidence is also wholly insufficient to justify the 5th finding for the reasons and upon the testimony above mentioned. The evidence is also insufficient to sustain the 6th finding. On the contrary, it appears from the testimony before referred to that the money loaned was loaned to Tully, Ochoa & Co., and was to be applied to their use in part payment of their indebtedness to L. Zeckendorf & Co., and that Johnson, the plaintiff, knew nothing about any
119 arrangement between Tully, Ochoa & Co. and L. Zeckendorf & Co. as to their disposition of the money.

The evidence is also insufficient to justify the 9th finding, in this, that it does not show that Mr. J. Wittleshoefer was the general agent of the defendants, L. Zeckendorf & Co., at the time of the waiver of protest of the note in question for them. Wittleshoefer's entire testimony shows that he had no authority, and that he was not the general agent of L. Zeckendorf & Co., and it is corroborated by the evidence of Strauss and Steinfeld on the same subject and not in any way impeached.

The defendants, Zeckendorf and Steinfeld, further allege that the court erred in its conclusions of law and found upon insufficient evidence against in finding as a conclusion of law that Tully, Ochoa & Co. and L. Zeckendorf & Co. were joint makers of the promissory note in question; also the plaintiff is entitled to judgement against the defendants, Zeckendorf & Steinfeld, for the reason that the evidence shows that L. Zeckendorf & Co. were not makers of the note in question, but were endorsers (if Strauss was authorized to endorse in their name), and were entitled to notice of non-payment by the maker, which they did not receive; that it appears fully by the uncontradicted testimony of Stein-, when recalled by the defendants and questioned on the subject, that Tully, Ochoa & Co.
120 were perfectly solvent when the note became due and for a long time afterwards.

EARLL, CAMPBELL & STEPHENS,
Att'ys for Def'ts Zeckendorf and Steinfeld.

Endorsed: Filed Feb. 2d, 1886. J. H. Martin, clerk.

We hereby agree to the within statement as correct.
EARLL, CAMPBELL & STEPHENS,
Attorneys for Defendants Zeckendorf and Steinfeld.
R. D. FERGUSON AND
H. R. JEFFORDS,
Plaintiff's Attorneys.

This statement was read and referred to on the motion for a new trial, made in this case by the defendants, L. Zeckendorf & Co., this 13th day of February, 1886.

WM. H. BARNES,
Judge of Pima Co. Dist. Court.

Notice of Intention to Move for a New Trial.

(Title of court and cause.)

You will please take notice that it is the intention of the
121 defendants, L. Zeckendorf and Albert Steinfeld, to move for a new trial in the above-entitled cause on the following ground, viz.:

1st. Insufficiency of the evidence to justify the decision and findings of the court.

2d. That the decision is against law.

3d. Errors in law occurring at the trial and excepted to by said defendants, Zeckendorf and Steinfeld.

Dated October the 1st, 1885.

Yours respectfully,

EARLL, CAMPBELL & STEPHENS,
Attorneys for Defendants, L. Zeckendorf and Albert Steinfeld.

To the clerk of said district court and R. D. Ferguson, Esq., plaintiff's attorney

Endorsed: Filed October 2d, 1885. C. S. Jeffords, clerk.

Service of copy of the within notice this 2d day of October, 1885, is hereby acknowledged.

R. D. FERGUSON,
Attorney for Plaintiff.

Decision.

(Title of court and cause.)

This — came on for hearing on a motion for a new trial by L. Zeckendorf & Co., and the motion having been heard the same is
122 by me overruled on the ground that the evidence shows a good cause of action in the plaintiff.

WM. H. BARNES.

Endorsed: Filed February 13, 1886. J. H. Martin, clerk.

Notice of Appeal.

(Title of court and cause.)

To the clerk of the above-mentioned court, to the said plaintiff and his attorneys, Jeffords & Franklin and R. D. Ferguson, Esq.:

You will take notice that the above-named defendants, L. Zeckendorf and Albert Steinfeld, hereby appeal to the supreme court of the Territory of Arizona from the judgment made and rendered and entered in the above-entitled cause and court on the 26th day of September, A. D. 1885, in favor of plaintiff and against the said de-

fendants and from the whole thereof, and also from the order of said court, made and entered herein on the 13th day of February, A. D. 1886, denying the said defendants' motion for a new trial herein.

Very respectfully,

EARLL, CAMPBELL & STEPHENS,

Attorneys for Defendants, L. Zeckendorf and Albert Steinfeld.

123 Endorsed: Filed February 24, 1886. J. H. Martin, clerk

Service by copy of the within notice acknowledged this 24th day of February, 1886.

H. R. JEFFORDS,
R. D. FERGUSON,
Attorneys for Plaintiff.

A good and sufficient undertaking on appeal, approved by the court, was filed in this action on the 12th day of March, 1886.

J. H. MARTIN, *Clerk.*

Clerk's Certificate.

TERRITORY OF ARIZONA, } ss:
County of Pima, }

I, John H. Martin, clerk of the district court of the first judicial district of the Territory of Arizona in and for the county of Pima, do hereby certify that the foregoing is a correct transcript of the judgment roll, decision of the court, notice of motion for a new trial, decision of the court denying the same, statement on motion for new trial, and notice of appeal.

In testimony whereof I have hereto set my hand and seal of said court this — day of ——, A. D. 188–.

—— ——.

124 SUPREME COURT, *Arizona Territory:*

In the Supreme Court of the Territory of Arizona.

JOHN S. JOHNSON, Plaintiff and Respondent,

vs.

L. ZECKENDORF and ALBERT STEINFIELD, Partners under the Firm Name of L. Zeckendorf & Co., Defendants & Appellants, who were Impleaded with P. R. Tully, Estevan Ochoa, and Sidney R. De Long, Partners under the Firm Name of Tully, Ochoa & Co.

I, E. B. Dodge, clerk of the supreme court of the Territory of Arizona, do hereby certify that the annexed is a full, true, and correct copy of the transcript in the above-entitled cause, and that the same is the transcript upon which the cause was presented to said
125 supreme court of Arizona and argued, submitted, and judgment of affirmance rendered on the eighth day of Nov'r, A. D. 1886.

In testimony whereof I have hereunto set my hand and affixed the seal of said court on this the 8th day of January, A. D. 1887.

[Seal United States Supreme Court, Arizona.]

E. B. DODGE, *Clerk.*

126 In the Supreme Court of the Territory of Arizona. Adjourned January Term, A. D. 1886.

JOHN S. JOHNSON, Plaintiff,

vs.

P. R. TULLY, ESTEVEN OCHOA, SIDNEY R. DE LONG, &c., and L. ZECKENDORF & COMPANY, Defendants & App'l'ts.

This cause having been heretofore submitted and by the court taken under advisement, and being fully advised in the premises, it is by the court ordered and adjudged that the order and judgment of the court below appealed from be, and the same are, affirmed.

Judgment entered this 8th day of November, 1886.

Attest: E. B. DODGE, *Clerk*,
By ED. H. COOK, *Deputy.*

127 In the Supreme Court of the Territory of Arizona, *ss:*

I, E. B. Dodge, clerk of the supreme court of the Territory of Arizona, do hereby certify the foregoing to be a full, true, and correct copy of the judgment in the case of John S. Johnson *vs.* L. Zeckendorf & Co. *et al.* and recorded in judgment book one, on page 121, of the supreme court and now in the office of the clerk of said court.

Witness my hand and the seal of said court this 25th day of February, A. D. 1887.

[Seal United States Supreme Court, Arizona.]

E. B. DODGE, *Clerk.*

[Endorsed:] Copy of judgment.

128 *Opinion by Barns, Associate Justice.*

In the Supreme Court of the Territory of Arizona.

JOHN JOHNSON, Plaintiff and Appellee,

vs.

L. ZECKENDORF & Co., Defendants and Appellants.

Earll, Campbell & Stephens and Chas. Silent for appellants; R. D. Furgerson and Jeffords and Franklin for appellee.

This was an action brought by Johnson against L. Zeckendorf & Co. upon a promissory note made by Tully, Ochoa & Co. and purporting to be endorsed by L. Zeckendorf & Co. The note reads as follows:

$2,800. TUCSON, A. T., *Sept.* 17, 1881.

Three months after date we promise to pay to the order of L. Zeckendorf & Co. twenty-eight hundred dollars, at two per cent. interest per month, value received.

(Signed) TULLY, OCHOA & CO.

(Endorsed:) L. Zeckendorf & Co.

After the endorsement of L. Zeckendorf & Co. and upon the back of the note these words were written:

We hereby waive protest.
Tucson, A. T., Dec. 17, 1881.

L. ZECKENDORF & CO.
J. WHITTLEOFF.

It appears from the evidence in this case that the defendants, Tully, Ochoa & Co. and L. Zeckendorf & Co., were separate mercantile houses doing business at Tucson; that the former were indebted to the latter, who were pressing for a reduction of the balance due. The plaintiff had made known to a broker by the name of Fried that he had $2,800.00 to loan. L. Zeckendorf & Co. went to
129 the broker and told him that Tully, Ochoa & Co. were indebted to them and that they were trying to get payment. Fried said he had a customer for whom he would loan $2,800.00 with L. Zeckendorf & Co.'s endorsement. Tully, Ochoa & Co. also asked him if he could get them a loan. He said he could with L. Zeckendorf & Co.'s endorsement. The note was handed to him, and plaintiff handed him the money and he delivered the note to plaintiff. Zeckendorf & Co. paid him $42.00, one-half of one per cent. for ninety days brokerage for negotiating this loan. The money went to L. Zeckendorf & Co., and on that day Tully, Ochoa & Co. were credited $2,800 on the books of Zeckendorf & Co. The plaintiff left the note in the safe of Mr. Etchells for safe keeping. When the note was due, viz., Dec. 17th, Etchells took the note to L. Zeckendorf & Co.'s head of business and handed it to the person in charge of the main office. The person to whom it was handed directed him to Whittleshoefer, who was the book-keeper; the latter took the note and wrote the endorsement of Dec. 17th. At that time the members of the firm of Zeckendorf & Co. were absent, as well as Strauss, the general financial manager, and Whittleshoefer was left in charge of the business. The court below found the above facts substantially, and, as a matter of law, concluded that Zeckendorf & Co. was a joint maker of the note and so liable without notice of non-payment by Tully, Ochoa & Co. The court also found that Whittleshoefer was an agent authorized to waive protest and bind the firm. The appellants seek to reverse this case for errors in concluding that Zeckendorf & Co. were joint makers and not endorsers, and that Whittleshoefer was authorized to waive protest.
130 If Zeckendorf & Co. are joint makers no protest was necessary, but if they are endorsers notice, demand, and protest were necessary, and it then becomes important to enquire whether

notice, demand, and protest were waived. Upon its face this is no other than a contract of endorsement. Tully, Ochoa & Co. are the makers; Zeckendorf & Co. are the payees; Zeckendorf & Co. wrote their names on the back of the note and so are endorsers in blank. This was done on the date of the note. The evidence in this case confirms that. Plaintiff was willing to loan on Zeckendorf & Co.'s endorsement and not otherwise. Zeckendorf & Co. negotiated this loan—that is, discounted the note and paid the brokerage therefor. The proceeds of the note went to them, and they on the same day gave Tully, Ochoa & Co. credit for the same. The transaction was no other than the ordinary discount by the payee of a note by endorsement. Tully, Ochoa & Co. owed Zeckendorf & Co. and gave their note to them, who endorsed it to plaintiff. It was not accommodation paper nor an accommodation endorsement by a stranger to the note, and hence does not come within Rey *vs.* Simpson (22 Howard, 341); Goode *vs.* Martin (95 U. S., 90), and that class of cases. These cases hold that a stranger to a note who endorses the same before delivery is a joint maker of the note. While this is sustained by the weight of authority, and, as we think, by the better reason, it has met strong opposition. See note to Burton *vs.* Hansford (10 W. Va., 470), 27 Am. Reports, 580; note to Jones *vs.* Goodwin (39 Cal., 493), 2 Am. Reports, 475; note to Fitzhugh *vs.* Love & Co. (6 Cal., 5), 3 Am. Decisions, 571, and note Moris *vs.* Robbins (11 Mass., 436), 6 Am. Dec., 182.

131 We conclude that the court below erred in holding that Zeckendorf & Co. were joint makers of the note with Tully, Ochoa & Co. and therefore liable as a principal. As first endorsers Zeckendorf & Co. were entitled to notice of demand upon and nonpayment by the makers, Tully, Ochoa & Co., unless the evidence shows that this was waived. On the back of the note in evidence, on the date of the maturity of the note, was endorsed the words "We hereby waive protest," signed by Zeckendorf & Co., "J. Whittleshoefer." It could not be contended that this would not be a waiver if signed by one of the firm of Zeckendorf & Co., but it is insisted that Whittleshoefer, who wrote "L. Zeckendorf & Co." on the note, had no authority to do so. This was one of the issues of fact on the trial, and the court found that he had authority to waive protest and bind the firm. We cannot say that this finding is erroneous. There is evidence to sustain it. The evidence was better presented before the trial court than it can be here, and that court can better determine disputed questions of fact. Etchells, with whom the note was left for safe keeping, testified that he told plaintiff when the note was due to remind him and he would go and have them waive protest or pay the money; that plaintiff did remind him, and on the day the note was due he took it to Tully, Ochoa & Co. first and demanded payment and they wrote their name on the back of it. He then took it to Zeckendorf & Co. and presented it to some one at the table in the front or main office and he, whoever he was, directed him to Whittleshoefer, who was in the inner office. Whittleshoefer took the note and wrote the waiver of protest on the back and handed it back to him.

132 Nothing was said; he did not say he had no authority to do it. Whittleshoefer testified that he was the book-keeper of

Zeckendorf & Co., and had been for five years; that the waiver of protest was in his handwriting; it was done in the office of Zeckendorf & Co. Steinfield and Strauss were out of town. In their absence that he had drawn checks; that his signature was placed in the bank by Mr. Steinfield. In the absence of Steinfield and Strauss that he drew checks for the interest of the business, and it was left to his judgment as to the amount and when needed, and he would have checked to pay an accepted bill when due and presented. Asked what he would have done if a matured note had been presented and what would have been his authority, he did not answer.

There was much evidence and much contradiction directed to proof of other similar acts by Whittleshoefer, but we do not think it material to enquire further. We think Zeckendorf & Co. were clearly bound by the waiver of protest by Whittleshoefer. Had he, in the absence of the members of the firm and of Strauss, the general manager, been found in the general office of Zeckendorf & Co. on the day the note was due, and then and there he had been served with notice of demand upon the makers and non-payment of the note, such service would have been good (Bank of La. *vs.* Mouseker, 15 La., 115; Banking Ass's, N. V. Place, 4 Duer, 212; Jacobs *vs.* Town, 2 La. Ann., 964; More *vs.* Kaiser, 20 La. Ann., 377). We quote from Daniels on Negotiable Instruments, sec. 1017:

"Notice left with a clerk or person in charge at the party's place of business in his absence, or at his place of business, without
133 proof as to the person with whom it was left, is sufficient, and proof that such person was not the party's agent has been held irrelevant. Notice being left at the right place, so leaving it with his private secretary at his public office is sufficient."

Notice served upon Whittleshoefer would have been good service, but when the service was waived he waived protest and all further steps in the matter. If he were not specially authorized to do this, who should lose, his employer or the person who found him ostensibly in charge of the business in the absence of the employer, and toward whom he demeans himself as general agent in charge, and assumes to act as such? We think the former. This disposes of all the questions in the case.

The judgment is affirmed.

W. H. Barnes, Wm. W. Porter.

In the Supreme Court of the Territory of Arizona.

I, E. B. Dodge, clerk of the supreme court of the Territory of Arizona, do hereby certify the foregoing to be a full, true, and correct copy of the opinion in the case of John S. Johnson *vs.* E. Zeckendorf & Co., and filed November the 8th, 1886, in the office of the clerk of the supreme court.

Witness my hand and the seal of said court this 16th day of Nov., 1886.

[Seal United States Supreme Court, Arizona.]

E. B. DODGE, *Clerk.*

25 days from Nov. 8.
9—1044

Endorsed: Copy of opinion. Filed Nov'r 8th, 1886. E. B. Dodge, clerk, by Ed. H. Cook, deputy.

134 JOHN S. JOHNSON, Plaintiff and Appellee,

vs.

L. ZECKENDORF and ALBERT STEINFELD, Partners under the Firm Name of L. Zeckendorf & Co., Appellants & Defendants, who were Impleaded with P. R. Tully, Estevan Ochoa, & Sidney R. De Long, Partners under the Firm Name of Tully, Ochoa & Co.

To the honorable the Supreme Court of the United States:

The appeal of L. Zeckendorf and Albert Steinfeld, above-named defendants and appellants, respectfully showeth—

That upon the 19th day of March, 1885, the above-named plaintiff and appellee filed his second amended complaint in the district court of the first judicial district of the county of Pima and Terri-
135 tory of Arizona, against P. R. Tully, Estevan Ochoa, and Sidney R. De Long, partners under the firm name of Tully, Ochoa & Co., and these defendants and appellees, as partners under the firm name of L. Zeckendorf & Co., alleging that on the 17th day of September, A. D. 1881, at Tucson, in said Pima county, the said P. R. Tully, Estevan Ochoa, and Sidney R. De Long, partners under the firm name of Tully, Ochoa & Co., made their promissory note as follows:

"$2,800. TUCSON, A. T., *Sept. 17th*, 1881.

"Three months after date we promise to pay to the order of L. Zeckendorf & Co. twenty-eight hundred dollars at two per cent. interest per month, value received.

"(Signed) TULLY, OCHOA & CO."

That on the 17th day of September, 1881, these defendants and appellants, then partners under the style of L. Zeckendorf & Co., indorsed the said note with their firm name, "L. Zeckendorf & Co.," and said Tully, Ochoa & Co. delivered the same to plaintiff, and then and there procured from him the said sum of $2,800 for
136 the mutual accommodation of both of said firms.

That afterwards, to wit, on the 17th day of December, 1881, the said L. Zeckendorf & Co. waived notice of demand and non-payment of the same by indorsement on said note in words and figures as follows, to wit:

"We hereby waive protest.

"Tucson, A. T., Dec. 17th, 1881.

"(S'd) L. ZECKENDORF & CO.
"J. WITTLEOBF."

And at the last named date and place said Tully, Ochoa & Co. waived notice of demand and non-payment of said note by indorsement thereon in words to wit:

"We hereby waive protest on the within.

"(S'd) TULLY, OCHOA & CO."

That said note was made by the defendants, Tully, Ochoa & Co. for the use and benefit of said defendants, L. Zeckendorf & Co., and was indorsed by said defendants, L. Zeckendorf & Co., for the
137 purpose of securing a loan of $2,800 from the plaintiff on the faith of said indorsement.

That the defendants, L. Zeckendorf & Co., indorsed the same for the purpose of procuring from this plaintiff for said L. Zeckendorf & Co. the sum of $2,800, knowing that the same would be so procured and the note so passed and indorsed by said L. Zeckendorf & Co., with their privity, to this plaintiff and said sum of $2,800 obtained from plaintiff solely on the faith of said indorsement and paid over to the said firm of L. Zeckendorf & Co. for their use and benefit.

Further alleging that plaintiff is the owner and holder of the note, and that no part of the principal or interest has been paid except as follows, viz: Dec. 17th, 1881, $168; March 25th, 1882, $168; December 21st, 1882, $350; Feb'y 23rd, 1883, $154; March 27th, 1883, $168, and Nov. 7th, 1883, $190, making total payments of interest $1,198, and that the whole of said note except such payments still remains due, owing, and unpaid; and praying for judgment
138 against the defendants for the sum of three thousand three hundred and ninety-seven $\frac{15}{100}$ dollars, with two per cent. interest per month on the sum of $2,800 from the 19th day of May, 1884, and for the costs of the action and legal damages and for other relief.

Tully, Ochoa & Co. suffered judgment by default.

On the 31st day of March, 1885, these appellants, L. Zeckendorf & Co., filed their answer to said second amended complaint in said district court, denying specifically that they or any one by their authority endorsed said note or delivered it to the plaintiff, or that they or either of them procured the said $2,800 from the plaintiff, or that that sum or any part thereof was procured for the mutual accommodation of said firm of L. Zeckendorf & Co. and Tully, Ochoa & Co., but alleging that the whole thereof was pro-
139 cured from the plaintiff by the firm of Tully, Ochoa & Co. and for their sole use and accommodation.

The appellants aforesaid further denied that at any time L. Zeckendorf & Co. or either member of the firm or any person authorized by them or either of them waived notice of demand or non-payment, and denied that the words, "We hereby waive protest. Tucson, A. T., Dec. 17th, 1881. L. Zeckendorf & Co., J. Wittleobf," or any of said words or figures in said alleged indorsement were made by said firm or either member thereof or any authorized person; or that the note was made for the use or benefit of L. Zeckendorf & Co., and averred that Tully, Ochoa & Co. made the note for their own use and benefit and for the purpose of procuring the said $2,800 loan for themselves, and the same was procured by them and no part thereof was procured by L. Zeckendorf & Co., and denied that the defendants, L. Zeckendorf & Co., indorsed the
140 said note for the purpose of procuring the said sum of $2,800 or any part thereof for said L. Zeckendorf & Co., but, on the contrary, said last-named defendants (now appellants) alleged

that neither member of the firm ever indorsed said note, and that if said note was indorsed by any agent or employé of the firm it was so endorsed for the accommodation, use, and benefit of Tully, Ochoa & Co., and not for the purpose of procuring the money for L. Zeckendorf & Co., and that neither member of said firm had any knowledge of the making of said note or the endorsement thereof or of the procuring of said money from the plaintiff until nearly three years after the date of said note.

The pleadings were all duly verified.

Afterwards, viz., on the 31st day of March, 1885, the cause came on for trial before the court, a jury having been waived, and
141 the cause was submitted for decision upon the evidence then given, and the court, on the 26th day of Sept., 1885, made the following findings, viz:

I.

That on the 17th day of September, 1881, the defendants, Tully, Ochoa & Co., executed the promissory note set forth in the complaint herein.

II.

That on the 17th day of September, 1881, Charles M. Strauss endorsed the promissory note set forth in the complaint herein in the name of said defendant-, L. Zeckendorf & Co., and for them.

III.

That said Charles M. Strauss was the cashier of defendants, L. Zeckendorf & Co., and was fully authorized to endorse said promissory note for them and in their name.

IV.

That said defendants, Tully, Ochoa & Co. and L. Zeckendorf & Co., caused said promissory note to be delivered to said
142 plaintiff in consideration of the loan of the sum of two thousand eight hundred ($2,800) dollars, lawful money.

V.

That said promissory note was made by the defendants, Tully, Ochoa & Co., payable to L. Zeckendorf & Co., and endorsed by the defendants, L. Zeckendorf & Co., before the delivery thereof to plaintiff, for the preconcerted and express purpose of borrowing from the plaintiff the said two thousand eight hundred dollars on said promissory note.

VI.

That it was intended and agreed between all the defendants at the time said promissory note was made, endorsed, and delivered to plaintiff that all the money thereof should go to the defendants, L. Zeckendorf & Co., and be applied to their use, and it was not intended that said promissory note should be held or carried by the defendants, L. Zeckendorf & Co., until the maturity thereof.

143 VII.

That the said sum of twenty-eight hundred dollars so borrowed from plaintiff on said promissory note was received by the defendants, L. Zeckendorf & Co., on the 17th day of September, 1881.

VIII.

That said sum of two thousand eight hundred dollars was loaned by plaintiff on the faith of the endorsement of said L. Zeckendorf & Co., defendants.

IX.

That the plaintiff caused the said promissory note to be presented at the office of the defendants, L. Zeckendorf & Co., on the 17th day of December, 1881, for the purpose of having said defendants, L. Zeckendorf & Co., waive notice of demand for payment and notice of non-payment thereof; that both Albert Steinfeld and Louis Zeckendorf were absent from Tucson, as was also Charles M.
144 Strauss, cashier of said defendants, L. Zeckendorf & Co., and thereupon J. Whittleshoeffer, who was then and there the general agent of said defendants, L. Zeckendorf & Co., and who was then and there in charge of their business in Tucson, Arizona, acting for the said defendants, L. Zeckendorf & Co., waived notice of demand for payment and notice of the non-payment of the said promissory note in the words and figures following, to wit: "We hereby waive protest. Tucson, A. T., Dec. 17th, 1881. L. Zeckendorf & Co., J. Wittlobf." That said Wittleshoeffer was then and there fully authorized to make said waiver for said L. Zeckendorf & Co., defendants.

X.

That before the commencement of this action plaintiff caused said promissory note to be presented to Albert Steinfeld, the resident member of the firm of L. Zeckendorf & Co., defendants, at
145 said city of Tucson, with demand that said defendants, L. Zeckendorf & Co., pay said promissory note according to the tenor and effect thereof; that at the time said promissory note was so presented and shown to said Albert Steinfeld and payment thereon demanded as aforesaid the books of the defendants, L. Zeckendorf & Co., showed that the proceeds of said promissory note had been received by the said defendants, L. Zeckendorf & Co., on the said 17th day of September, 1881, and, although said Steinfeld then and there saw that said promissory note was endorsed, in the name of the defendants, L. Zeckendorf & Co., by Charles M. Strauss, he then and there refused, on the part of said firm, to pay said promissory note according to the tenor and effect thereof or to surrender the proceeds of the same or any part of said proceeds.

146 XI.

That no part of the principal sum of two thousand eight hundred dollars so loaned on said promissory note has been paid.

XII.

That $1,198.00 and no more has been paid as interest on said promissory note; that there is still due and unpaid on said promissory note the principal sum of twenty-eight hundred dollars and interest thereon in the sum of $1,504.93, aggregating the sum of $4,304.93 due and unpaid as principal and interest on said promissory note.

Conclusions of Law.

As conclusions of law from the foregoing facts the court finds that Tully, Ochoa & Co. and L. Zeckendorf & Co. were joint makers of said promissory note and that L. Zeckendorf & Co. waived notice of demand for payment and notice of non-payment of said promissory note; that plaintiff is entitled
147 to judgment against said defendants, L. Zeckendorf and Albert Steinfeld, partners under the firm name of L. Zeckendorf & Co., for the sum of $4,304.93 and the costs of suit and the percentage allowed by law and interest thereon from the date hereof upon said principal sum of $2,800.00 until paid at the rate of two per cent. per month, and interest upon the balance at 10 per cent. per annum.

And it is ordered that judgment be entered accordingly.

Dated this 26th day of September, 1885.

148 The court made also the following additional findings:

I.

That at and before the time the promissory note described and set forth in the complaint in the above-entitled cause was made, executed, endorsed, and delivered the defendants, Tully, Ochoa & Co., were indebted to defendants, L. Zeckendorf & Co., in a sum largely exceeding the amount borrowed on said promissory note.

II.

That on the day the said sum of $2,800.00 was borrowed on said promissory note L. Zeckendorf & Co. gave credit to Tully, Ochoa & Co. on the books of L. Zeckendorf & Co. for the amount of $2,800.00, being the proceeds of said promissory note, and at the time the said sum of $2,800.00 was loaned on said promissory note the plaintiff did not know the intention or purpose for which the said money was borrowed.

149 And thereupon, on the said 26th day of September, 1885, the said district court caused to be entered final judgment in the said cause, adjudging that said J. S. Johnson, the plaintiff, do have and recover from the defendants, L. Zeckendorf and Albert Steinfeld, partners under the firm name of L. Zeckendorf & Co., defendants, the sum of $4,304.93, with interest on $2,800 of

said sum at the rate of two per cent. per month from the date of said judgment until paid, and interest on $1,504.93 at the rate of ten per cent. per annum from the date of said judgment until paid, together with plaintiff's costs and disbursements incurred in the action, amounting to $115.05, and $116.09 percentage allowed by law.

Afterwards, and within the time allowed by law, the de-
150 fendants, L. Zeckendorf and Albert Steinfeld, filed and served their notice of intention to move for a new trial on the grounds of the insufficiency of the evidence in the cause to justify the decision and findings of the court and that the decision is against law, and also on the ground of errors in law occurring at the trial.

Afterwards and within the time required by law the statement of the case required by the laws of Arizona was made and settled by the judge of said district court, and thereafter the said defendants, L. Zeckendorf and Albert Steinfeld, moved for a new trial upon the grounds in said statement mentioned and set forth, and said motion having been duly argued by the counsel for the respective parties, the same was, on the 13th day of February, 1886, denied by said district court.

These appellants further say that thereafter, viz., on the
151 24th day of February, A. D. 1886, these appellants appealed to the supreme court of the Territory of Arizona from said judgment and the whole thereof, and also from the order denying the motion for a new trial in said cause, and on said last-mentioned day filed with the clerk of said district court their notice of appeal therefrom, and within proper time gave a good and sufficient undertaking on appeal and for a stay of proceedings on said judgment duly approved by said court, and thereupon the transcript in said cause was prepared by the clerk and transmitted to the supreme court of said Territory, and the appeal from said judgment and said order was heard by said court at the adjourned March term, 1886, thereof; and afterwards, on the 8th day of November, 1886,
152 the said supreme court of the Territory of Arizona pronounced and caused to be entered its judgment affirming the said judgment by the said district court and the order denying a new trial, and has since that time caused a remittetur to issue in said cause.

The appellants further say that the amount in controversy between the appellants and respondents in said suit at the time of the pronouncing and entering of said judgment of affirmance, exclusive of costs, exceeded the sum of $5,000.

Wherefore these appellants appeal from the said judgment of affirmance of the said judgment of said district court and of the order denying a new trial, and respectfully pray that the judgment of said supreme court of Arizona and the pleadings, complaints, answers, depositions, transcripts, findings, judgments, evi-
153 dence, and proceedings in said cause may be sent to the Supreme Court of the United States, and that the said Supreme Court will proceed to hear said cause, and that said judgment of

affirmance may be reversed or such other order may be made as to the Court may seem fit.

S. O. HOUGHTON,
Attorney and Counsel for Albert Steinfeld and Louis Zeckendorf, Appellants.

The within appeal is hereby allowed.
Dated this 4th day of February, 1887.

STEPHEN J. FIELD,
Associate Justice of U. S. Supreme Court.

154 In the Supreme Court of the Territory of Arizona.

I, E. B. Dodge, clerk of the supreme court of the Territory of Arizona, do hereby certify the foregoing to be the petition for an appeal, with the allowance thereon, in the case of John S. Johnson *vs.* L. Zeckendorf & Co. *et al.* and filed in the office of the clerk of the supreme court on the 25th day of February, A. D. 1887, Territory of Arizona.

Witness my hand and the seal of said court this 25th day of Feb'y, A. D. 1887.

[Seal United States Supreme Court, Arizona.]

E. B. DODGE, *Clerk.*

[Endorsed:] Allowance of appeal. Filed Feb'y 25th, 1887. E. B. Dodge, clerk supreme court.

Copy of Citation.

155 The United States of America to John S. Johnson, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to an order allowing an appeal filed in the clerk's office of the supreme court of the Territory of Arizona, wherein L. Zeckendorf and Albert Steinfeld are appellants and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellants, as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Stephen J. Field, associate justice of the Supreme Court of the United States, this fourth day of February, in the year of our Lord one thousand eight hundred and eighty-seven.

STEPHEN J. FIELD.

156 On this fourteenth day of March, in the year of our Lord one thousand eight hundred and eighty-seven, personally appeared Earll H. Webb before me, the subscriber, T. D. Satterwhite, a notary public in and for the county of Pima, Territory of Arizona, and makes oath that he delivered a true copy of the within citation

to R. D. Ferguson, Esqr., one of the attorneys for the within-named John S. Johnson, the appellee herein, and also delivered another true copy thereof to Messrs. Jeffords and Franklin, the other attorneys for said Johnson, this 14th day of March, A. D. 1887, at their respective offices, at Tucson, Arizona Territory.

EARLL H. WEBB.

Sworn to and subscribed the fourteenth day of March, A. D. 1887.

[L. S.] THOS. D. SATTERWHITE,
Notary Public.

On the 17th day of March, in the year of our Lord one thousand eight hundred and eighty-seven, personally appeared H. M. Mitchell before me, the subscriber, W. B. Burke, a notary public in and for the county of Los Angeles, State of California, and makes
157 oath that he delivered a true copy of the within citation to the within-named John S. Johnson, the appellee herein, at Los Angeles, State of California, this 17th day of March, A. D. 1887.

H. M. MITCHELL.

Sworn to and subscribed before me the seventeenth day of March, A. D. 1887.

[L. S.] W. B. BURK,
Notary Public.

Copy of the within rec'd this 17th day of March, 1887, at Los Angeles, Cal.

JOHN S. JOHNSON.

Service admitted by copy this 14th day of March, 1887.

JEFFORDS & FRANKLIN.
R. D. FERGUSON.

Filed April 20th, 1887.

E. B. DODGE,
Clerk Supreme Court, Arizona Territory.

158 TERRITORY OF ARIZONA, ss:

Supreme Court.

I, E. B. Dodge, clerk of the supreme court for the Territory of Arizona, do hereby certify the foregoing to be a full, true, and correct copy of the citation to John S. Johnson, wherein L. Zeckendorf and Albert Steinfield are appellants, with the affidavits of service, endorsements, and filing thereon.

In witness whereof I have hereunto set my hand and the seal of the supreme court of the Territory of Arizona this 13th day of June, A. D. 1887.

[Seal United States District Court, Arizona, Third District.]
[Seal United States Supreme Court, Arizona.]

E. B. DODGE, *Clerk.*

159 In the Supreme Court of the United States of America.

JOHN S. JOHNSON, Plaintiff and Appellee,

vs.

L. ZECKENDORF and ALBERT STEINFELD, Partners under the Firm Name of L. Zeckendorf & Co., Defendants and Appellants, who were Impleaded with P. R. Tully, Estevan Ochoa, and Sidney R. De Long, Partners under the Firm Name of Tully, Ochoa & Co.

Know all men by these presents that we, F. Marsh, M. G. Saminego, Miguel Moreno, and Leo Goldschmidt, are held and firmly bound unto John S. Johnson, of ——, in the sum of twelve thousand dollars, to be paid to the said John S. Johnson, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, or administrators, firmly by these presents.

160 Sealed with our seals. Dated this 29th day of December, 1886.

Whereas the above-named L. Zeckendorf and Albert Steinfeld have prosecuted an appeal to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of the Territory of Arizona:

Now, therefore, the condition of the above obligation is that if the above-named L. Zeckendorf and Albert Steinfeld shall prosecute their said appeal to effect and answer all costs and damages if *he* shall fail to make good *his* plea, then this obligation shall be void; otherwise to remain in full force and virtue.

F. MARSH. [SEAL.]
M. G. SAMANIGO. [SEAL.]
MIGUEL MORENO. [SEAL.]
L. A. GOLDSCHMIDT. [SEAL.]

TERRITORY OF ARIZONA, *County of Pima*, } ss:

F. Marsh, the person named in and who signed and subscribed the above and foregoing bond as the party thereto, being duly sworn, for himself says that he is a resident and freeholder

161 within the county of Pima, Territory of Arizona, and is worth the sum of twelve thousand dollars, specified as the penalty thereof, over and above all just debts and liabilities, exclusive of property exempt from execution.

F. MARSH.

Sworn and subscribed to before me this 29th day of December, 1886.

[SEAL.]

EARLL H. WEBB,
Notary Public of Pima Co., A. T.

TERRITORY OF ARIZONA, } ss:
County of Pima, }

M. G. Samaneigo, Miguel Moreno, Leo Goldsmidt, being duly sworn, each for himself says that he is one of the parties who signed the above bond as a party thereto; that he is a resident and freeholder within the county of Pima, Territory of Arizona, and is worth more than four thousand dollars over and above all his just debts and liabilities, exclusive of property exempt from execution.

M. G. SAMONIEGO.
MIGUEL MORENO.
LEO GOLDSCHMIDT.

Sworn and subscribed to before me this 30th day of December, 1886.

[SEAL.] EARLL H. WEBB,
Notary Public of Pima Co., A. T.

The above bond approved, to operate as a supersedeas.
Feb'y 4th, 1887.

STEPHEN J. FIELD,
Associate Justice Supreme Court of the United States.

In the Supreme Court, the Territory of Arizona.

I, E. B. Dodge, clerk of the supreme court of the Territory of Arizona, do hereby certify the foregoing to be a full, true, and correct copy of the bond in the case of John S. Johnson *vs.* L. Zeckendorf & Co. and now on file in my office.

Witness my hand and the seal of said court this 25th day of February, A. D. 1887.

[Seal United States District Court, Third District Arizona.]

E. B. DODGE, *Clerk.*

Endorsed: Copy of bond. Filed Feb'y 25th, 1887. E. B. Dodge, clerk.

162 TERRITORY OF ARIZONA, } ss:
County of Pima, }

In the Supreme Court of the United States of America.

JOHN S. JOHNSON, Plaintiff and Appellee,

vs.

L. ZECKENDORF and ALBERT STEINFELD, Partners under the Firm Name of L. Zeckendorf & Co., Defendants and Appellants, who were Impleaded with P. R. Tully, Estevan Ochoa, and Sidney A. De Long, Partners under the Firm Name of Tully, Ochoa & Co.

Albert Steinfeld, being duly sworn, deposeth and saith that he is one of the appellants and defendants in the above-entitled cause,

and that the matter in dispute between the parties therein, exclusive of costs and the amount of the judgment affirmed by the supreme court of the Territory of Arizona against said appellants and in favor of the appellee, exclusive of costs, exceeded the sum of five thousand dollars at the time of the rendition and entry of said judgment of affirmance, and was of the amount and sum of five thousand two hundred and twenty-three and $\frac{35}{100}$ dollars, and has ever since exceeded and now exceeds said last-mentioned sum.

ALBERT STEINFELD.

Subscribed and sworn to before me this 19th day of January, 1887.

[Seal Notary Public, Pima County, A. T.]

EARLL H. WEBB,
Notary Public of Pima Co., A. T.

[Endorsed:] Affidavit of Albert Steinfeld.

163 TERRITORY OF ARIZONA, } ss:
County of Pima, }

In the Supreme Court of the United States of America.

JOHN S. JOHNSON, Plaintiff and Appellee.

vs.

L. ZECKENDORF and ALBERT STEINFELD, Partners under the Firm Name of L. Zeckendorf & Co., Defendants and Appellants, who were Impleaded with P. R. Tully, Estevan Ochoa, and Sidney R. De Long, Partners under the Firm Name of Tully, Ochoa & Co.

Albert Steinfeld, being duly sworn, saith that he is one of the appellants and defendants in the above-entitled cause, and that the amount in controversy between the parties therein and the
164 amount of the judgment affirmed by the supreme court of Arizona against said appellants and in favor of the appellee exceeded the sum of five thousand dollars at the time of the rendition and entry of said judgment of affirmance, exclusive of costs, and has ever since exceeded and now exceeds said last-mentioned sum.

ALBERT STEINFELD.

Subscribed and sworn to before me this 30th day of December, A. D. 1886.

[Seal Notary Public, Pima County, A. T.]

EARLL H. WEBB,
Notary Public of Pima County, A. T.

[Endorsed:] Two. Affidavit of A. Steinfield. Filed Feb'y 25th, 1887. E. B. Dodge, clerk supreme court.

165 *Assignment of Errors.*

In the Supreme Court of the United States of America.

JOHN S. JOHNSON, Plaintiff and Appellee,

vs.

L. ZECKENDORF and ALBERT STEINFELD, Partners under the Firm Name of L. Zeckendorf & Co., Defendants and Appellants, who were Impleaded with P. R. Tully, Estevan Ochoa, and Sidney R. De Long, Partners under the Firm Name of Tully, Ochoa & Co.

The appellants assign the following errors in the judgment of the supreme court of the Territory of Arizona, and pray for a reversal thereof on the grounds—

166 1st. That the evidence was wholly insufficient to authorize the 4th, 5th, 6th, and 9th findings of the district court, for the reasons assigned in the appellants' statement on motion for a new trial, to which reference is made, and should have been so held by the supreme court of Arizona.

2nd. That the evidence in the case was wholly insufficient to establish the fact that Wittleshoeffer was the general agent of the appellants or had authority to waive demand on the makers of the note or notice of non-payment to the endorsers, the appellants being indorsers and not makers of the note in question and being entitled to notice; and the supreme court of Arizona erred in holding that Wittleshoeffer was such agent and had such authority.

3rd. That said supreme court erred in holding that the note

167 was presented or taken to Wittleshoeffer on the day of its maturity and the alleged waiver then made, the undisputed evidence showing that it was taken to him on the 17th day of December and the alleged waiver then made, 3 days before it became due under the laws of Arizona and the law merchant, and in holding that that was sufficient notice of non-payment by the makers.

4th. Because it appears from the entire evidence that L. Zeckendorf & Co. were mere accommodation indorsers for the benefit of Tully, Ochoa & Co.; that they never received nor waived notice of non-payment, and never authorized Wittleshoeffer to waive it for them.

S. C. HOUGHTON,
Attorney and Counsel for Appellants.

168 In the Supreme Court of the Territory of Arizona.

I, E. B. Dodge, clerk of the supreme court of the Territory of Arizona, do hereby certify the foregoing to *to* be the assignments of errors in the case of John S. Johnson *vs.* L. Zeckendorf & Co. *et al.*, and filed in the office of the clerk of the supreme court Feb'y 25th, A. D. 1887, Territory of Arizona.

Witness my hand and the seal of said court this 25th day of February, A. D. 1887.

[Seal United States Supreme Court, Arizona.]

E. B. DODGE, *Clerk.*

[Endorsed:] Assignment of errors. Filed Feb'y 25th, 1887. E. B. Dodge, clerk.

Endorsed on cover: Arizona Territory supreme court. No. 1044. L. Zeckendorf and Albert Steinfeld, partners under the firm name of L. Zeckendorf & Co., appellants, vs. John S. Johnson. Filed September 15, 1887.

123-617

RECEIVED
NOV 3 1887
JAMES H. McKENNEY,
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

J. S. JOHNSON, APPELLEE,

v.

L. ZECKENDORF & ALBERT STEINFIELD, DOING BUSINESS IN FIRM NAME OF "L. ZECKENDORF & CO.," APPELLANTS (IMPLEADED WITH F. A. TULLY *et al.*)

No. 1044.

Appeal from the Supreme Court of the Territory of Arizona.

MOTION TO DISMISS AND AFFIRM.

Comes now the said appellee, by Van H. Manning and J. B. Edmonds, his solicitors, and moves the court to dismiss the appeal herein, because, as shown by the record of the case, the amount in controversy between the parties and the judgment appealed from does not exceed five thousand ($5,000) dollars, exclusive of costs, and this court has no jurisdiction of the cause.

And said appellant, by his said solicitors, also moves the court to affirm the decision of the court below, because, al-

though the record may show that this court has jurisdiction, it is manifest the said appeal was taken for delay only, and there are assigned for errors only alleged mistakes of fact and not of law as is required by statute and the rules of this court; and, second, there being no written stipulation waiving a jury trial filed in the court below, and no bill of exceptions presenting any legal point for consideration, the judgment should be affirmed with costs.

VAN H. MANNING AND
J. B. EDMONDS,
Of Counsel for Appellee.

STATEMENT AND BRIEF IN SUPPORT OF THE MOTION TO DISMISS AND AFFIRM.

The appellee recovered judgment in the district court of Arizona against the appellants upon a promissory note for $2,800 and interest to date of judgment, making a total of $4,304.05, besides costs.

A jury trial was waived by the consent of the parties, but without written stipulation therefor, and the judgment was rendered by the court upon findings of fact and law separately stated, no exceptions having been taken of any kind.

The appellants moved the court for a new trial on the ground that the findings of fact were not supported by the evidence and because the conclusion of the court holding that appellants were liable was not supported by the evidence. This motion was overruled and no exception taken. On appeal to the supreme court of the Territory the judgment was simply affirmed.

I.

The only possible theory upon which to sustain the jurisdiction of this court is that, since the rendition of the judg-

ment, the accumulations of interest have enlarged the judgment to a sum exceeding $5,000.

The only question on appeal is whether the judgment for $4,300 is erroneous or not. That is the only judgment to be enforced.

The question is settled as to what is meant by "matter in dispute." It is the matter for which suit is brought, issues joined, a jury called, and witnesses examined.

Lee *v.* Watson, 1 Wall., 337, 339.

The amount in dispute on appeal is no more than it was below.

R.R. Co. *v.* Knox, 110 U. S., 304–5.
Schacker *v.* Ins. Co., 3d Otto, 241.
Gray *v.* Blanchard, 7 Otto, 564.

Interest accruing on a judgment subsequent to its rendition cannot enter into the computation so as to give this court jurisdiction.

Knapp *v.* Banks, 2 How., 73.
Walker *v.* U. S., 4 Wall., 163.
Am. Tel. Co. *v.* Rogers, 3d Otto, 565.
R.R. Co. *v.* Trook, 10 Otto, 112.

If a judgment be entered in a district court, which is afterwards reviewed and affirmed by a circuit court, this court examines the case as it was in the district court to ascertain the amount in dispute.

Udall *v.* Steamship, 17 How., 17.

In the case of R.R. Co. *v.* Trook, *supra*, the judgment of the *Nisi Prius* court was for $2,500. If it had been at all in excess of that amount this court would have entertained jurisdiction.

The writ of error in that case was dismissed, although

the original judgment bore interest and had been appealed to, and affirmed by, a court superior to that originally giving the judgment.

That case, like the one in 17 How., 17, is quite like the one at bar in respect to having passed through an intermediate appellate court; and if accumulations of interest, while pending in the intermediate court, were allowable, the decisions must have been the opposite of what were given by this court in those cases.

The functions of the supreme court of the Territory are strictly confined to reviewing judgments below; no jury or new issues are allowable.

U. S. Rev. Stat., sec. 1869.

Compiled Acts of Arizona, p. 395, sec. 6.

The rule is indeed an old one, that if the judgment in the lower or original court be for the plaintiff that judgment ascertains the value of the matter in dispute in any superior court to which appeal is made by the defendant for review.

Gordon *v.* Ogden, 3 Pet., 33.

Merrill *v.* Petty, 16 Wall., 345, and the cases cited.

R.R. Co. *v.* Trook, 10 Otto, 112.

N. Y. R.R. *v.* Fifth Nat. Bk., 118 U. S., 608.

We need only add that affidavits showing the matter to be less or greater than that found by the court below will be disregarded.

Zeigler *v.* Hopkins, 117 U. S., 684.

II.

Suppose, however, this court has jurisdiction. Then the judgment should be affirmed under Rule 6, subdivision 5. The action was at common law. The parties consented that the court try the case, waiving a jury, without filing a writ-

ten stipulation therefor, and thereby waived a right of review by this court.

County *v.* Warren, 16 Otto, 622, and cases cited.
U. S. *v.* Harris, *Id.*, 634–'5.

The record shows no demurrer, objection, nor exception taken below, and they cannot be taken for the first time on appeal.

Turner *v.* Yates, 16 How., 14.
Rev. Stat. U. S., sec. 700.
Stebbin *v.* Duncan, 108 U. S., 32.
Martinton *v.* Fairbanks, 112 U. S., 670.
Street R.R. *v.* Hart, 114 U. S., 655.

The errors assigned in this case are only objections that the findings of the court below were not sustained by the evidence. Such assignment of errors is frivolous.

Those findings of fact are not reviewable here. "Where a case is tried by the court without a jury, the bill of exceptions brings up nothing for revision except what it would have done had there been a jury trial."

Martinton *v.* Fairbanks, 112 U. S., 670.

No error can be predicated upon a finding of fact by the court.

The Abbottsford, 8 Otto, 443.
Rev. Stat. U. S., sec. 1011.
Booth *v.* Tiernan, 109 U. S., 205.
U. S. *v.* Dawson, 11 Otto, 569.
Jeffries *v.* Life Ins. Co., 110 U. S., 309.
Martinton *v.* Fairbanks, 112 U. S., 670.

A bill of exceptions for refusing a new trial presents no question reviewable here.

Railway *v.* Tamley, 10 Otto, 78, and cases.

So it appears from the record in this case that there is nothing to predicate error upon, and that the errors assigned present no question reviewable by this court or are frivolous. In such cases affirmance is allowed upon motion.

James *v.* Bank, 7 Wall., 692.

Evans *v.* Brown, 106 U. S., 180.

Errors not properly assigned or presenting no question that this court can consider are as though not assigned.

Deitsch *v.* Wiggins, 15 Wall., 539.

Lucas *v.* Brooks, 18 Wall., 436.

We therefore respectfully submit that this appeal ought to be dismissed, or that the judgment should be affirmed, for the respective reasons aforesaid.

VAN H. MANNING AND
J. B. EDMONDS,
Of Counsel for Appellee.

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JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1887.

L. ZECKENDORF AND ALBERT STEINFELD, partners under the firm name of L. ZECKENDORF & Co., *Appellants*,
vs.
JOHN S. JOHNSON, *Appellee.*
No. 1044.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

MOTIONS TO DISMISS AND AFFIRM.

E. M. MARBLE,
Of Counsel for Appellant.

JUDD & DETWEILER, PR., WASHINGTON.

In the Supreme Court of the United States.

OCTOBER TERM, 1887.

L. ZECKENDORF AND ALBERT STEINFELD, partners under the firm name of L. ZECKENDORF & Co., *Appellants*, vs. JOHN S. JOHNSON, *Appellee*. } No. 1044.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

MOTIONS TO DISMISS AND AFFIRM.

STATEMENT OF FACTS AND BRIEF IN OPPOSITION TO THE MOTION TO DISMISS AND AFFIRM.

The record in this case shows that on May 20th, 1884, the appellee filed his complaint in the District Court of the First Judicial District of the Territory of Arizona, against the appellants and others—the appellants as endorsers—for the recovery of the sum or sums claimed to be due to him on a certain promissory note, in words and figures as follows, to wit:

"$2,800.00. TUCSON, A. T., *Sept. 17th*, 1881.

"Three months after date we promise to pay to the order of L. Zeckendorf & Co. twenty-eight hundred dollars, at two per cent. interest per month, value received.

"TULLY, OCHOA & Co.";

and that issue was joined in said cause March 31st, 1885, (Record, folios 5–25,)—the appellants denying that they or either of them ever endorsed their firm name on said note or authorized any person to do so for them, and also denying that they, or either of them, ever waived notice of protest of said note, or authorized any person to do so for them.

The record further shows that subsequently, and on the day last mentioned, said cause came on for trial before said District Court, without a jury, "a jury trial having been duly waived by both parties," and that upon the consideration of the testimony introduced in behalf of the parties respectively, and the arguments of counsel, the said Court on September 26th, 1885, made and filed with the clerk thereof, its findings of facts and conclusions of law, and caused a judgment to be entered against the appellants as joint makers of said note with Tully, Ochoa & Co., as follows:

"Wherefore, by reason of the law and the findings aforesaid, it is ordered and adjudged that J. S. Johnson, the plaintiff, do have and recover of and from L. Zeckendorf and Albert Steinfeld, partners under the firm name of L. Zeckendorf & Co., defendants, the sum of four thousand three hundred and four ($4,304.93) dollars and ninety-three cents, with interest on $2,800 of said sum, at the rate of two per cent. per month from the date thereof until paid, and interest on $1,504.93 at the rate of ten per cent. per annum from the date hereof until paid, together with plaintiff's costs and disbursements incurred in the action, amounting to $115.05, and one hundred and sixteen ($116.09) dollars and nine cents percentage allowed by law" (Record Fol. 33, p. 15); that on the 2d day of October, 1885, the appellants, by their attorneys, gave notice of a motion for a new trial of said cause, for errors in the findings of fact and conclusions of law,

(Record, Fol. 121, p. 60,) and that afterwards and on February 13th, 1886, such motion was heard and denied (Record, Fol. 122); that on the 24th day of February, 1886, an appeal was taken and filed by the appellants from the judgment rendered by said Court on September 26th, 1885, in favor of the appellee, and against the appellants, and also from the order of the Court denying appellants' motion for a new trial, to the Supreme Court of the Territory of Arizona (Record, Fol. 122, pp. 60, 61); and that on November 8th, 1886, the said Supreme Court, having heard and considered the case, rendered a decision holding that the District Court erred in deciding that the appellants were joint makers with Tully, Ochoa & Co. of the note on which suit was brought, (Record, Fol. 131, p. 64,) and held that said appellants were endorsers of said note only, but nevertheless affirmed the judgment of the District Court (Record, Fol. 126–133, pp. 62–65); that thereupon appellants filed their appeal from the decision of the Supreme Court of said Territory to the Supreme Court of the United States, (Record, Fol. 134–154, pp. 66–72,) filing with said appeal an assignment of errors, (Record, Fol. 165–167,) and the affidavit of Albert Steinfeld, one of the parties, showing the amount of the matter in controversy between the parties at the time said latter judgment was rendered, said amount not appearing in the judgment.

1.

The amount in controversy between the parties at the time the judgment was rendered by the Supreme Court of Arizona, from which appeal was taken to this Court, was five thousand two hundred and twenty-three dollars and thirty-eight cents ($5,223.38).

See affidavit of Stienfield (Record fol. 162, pp. 75, 76,) made in accordance with Secs. 702 and 1909, U. S. Revised Statutes, and not denied.

2.

The court will examine the whole record to determine the amount in dispute.

Gray *vs.* Blanchard, 7th Otto, 564, 565.
Schacker *vs.* Ins. Co., 93 U. S., 241.
Stinson *vs.* Dausman, 20 How., 461–467.
Sampson *vs.* Welsh, 24 How., 207, 208.
Benjamin *vs.* Dubois, 118 U. S., 46–48.
Street *vs.* Ferry, 119 U. S., 385, 386.

3.

The amount in dispute is the sum due at the time the judgment was rendered from which the appeal was taken.

Street *vs.* Ferry, *supra.*

4.

The jurisdiction of this Court is not claimed because of any interest which has accrued since the date of the judgment appealed from, but because the principal and interest found to be due at the date of the judgment of the District Court, were by said Court in its judgment made interest bearing principals, the rate of interest for each defined and stated, and made a part of said judgment, which principal sums with the interest thereon as therein directed amounted to $5,223.38 on the day on which the judgment of the Supreme Court of Arizona was rendered in said cause. (See Record fol. 38, p. 15.)

5.

Where interest is allowed by a decree, (and we think by a judgment as well,) and the principal sums with the interest added exceeds the jurisdictional limit, exclusive of costs, this Court has jurisdiction.

The Rio Grande *vs.* Otis, 19 Wall., 178.
Bank of the United States, *vs.* Daniel, 12 Peters, 32.
The Patapsco *vs.* Boyd, 12 Wall., 451.

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6.

And especially should this be so in this case, where the interest is specifically claimed in the complaint.

Olney *vs.* The Falcon, 17 Howard, 19.

II.

1.

This cause having been tried by the Court without a jury, "a trial by jury having been expressly waived by the counsel for the respective parties," an appeal is the proper and only way by which it could be brought to this Court for review.

Stringfellow *vs.* Cain, 99 U. S., p. 612.
Hecht *vs.* Boughton, 15 Otto., 235, 236.
Woolf *vs.* Hamilton, *et al.*, 108 U. S., 15.

2.

The statement of facts embraced in the appeal to this Court sets forth all of the proceedings taken in this cause, and with the assignment of errors, which is part of said appeal, and the motion for a new trial, therein referred to, and the reasons given why it should have been granted, contain everything which is deemed necessary to fully advise this Court of what the appellants deem erroneous findings of facts and conclusions of law.

See Record, Fol. 134–154; 165–167, and 35–121.
Stringfellow *vs.* Cain, *supra.*

3.

The record, showing as it does that the appellants have diligently and vigorously contested every step taken by the appellee in this case, is conclusive proof that this appeal was not taken for delay, but that justice might be done.

4.

It also appears that the District Court made special findings of fact, and conclusions of law, on all of the questions raised on the trial, and that after judgment rendered the appellants, through their counsel, promptly moved for a new trial, alleging errors in the findings of fact and conclusions of law, which, being denied, they, without delay, took an appeal to the Supreme Court of the Territory from the judgment rendered, and also from the order denying the new trial, as authorized by the statutes of Arizona.

Compiled Lands, Arizona, of 1877, Chap. 48, Sec. 349.

5.

The appellants have always denied that Whittleshoefer had any authority from them, or either of them, express or implied, to waive a notice of protest of the note in question, or any other note, and so Whittleshoefer testified; and, further, that he so informed the parties when they brought the note in question to him, and he wrote the waiver of protest on the same. Notwithstanding this denial of the appellants, and the testimony of Whittleshoefer, which is not denied, the District Court held that Whittleshoefer had the authority to waive notice of protest, and the Supreme Court of Arizona, without finding that Whittleshoefer was the agent of the appellants for any such purpose, held that because a notice of protest, if left with him in appellants' place of business, would be a good notice to them, that he had the right to waive notice of protest for the appellants, and they must be bound by his action.

The second, third and fourth assignments of error relate to this finding of said Court, and we think such ruling was so manifestly erroneous in law that this Court is bound to take cognizance of the errors thus assigned. Certainly with such a ruling, founded on such testimony, and based on acts which resulted in keeping the existence of said note entirely

from the knowledge of the appellants for more than three years, after it otherwise would have come to their knowledge, during which time the endorsees became insolvent, it cannot be reasonably or truthfully claimed that this appeal is for delay.

It is therefore respectfully submitted that the motions to dismiss and affirm should not be granted.

E. M. MARBLE,
of Counsel for the Appellants.